No. 90-149-CSY
Status: GRANTED

Title: Michigan, Petitioner
v.
Nolan K. Lucas

Docketed:
July 20, 1990

Court: Court of Appeals of Michigan

Counsel for petitioner: Baughman,Timothy A.

Counsel for respondent: Magidson,Mark K.

Entry	Date	Note	Proceedings and Orders
1	Jul 20 1990	G	Petition for writ of certiorari filed.
2	Aug 22 1990		DISTRIBUTED. September 24, 1990
3	Sep 5 1990	P	Response requested -- HAB. (Due October 5, 1990)
4	Oct 23 1990		Brief of respondent Nolan K. Lucas in opposition filed.
5	Oct 23 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Oct 31 1990		REDISTRIBUTED. November 21, 1990
7	Nov 26 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Nov 26 1990		Petition GRANTED.
			**********
9	Jan 10 1991		Brief amicus curiae of United States filed.
10	Jan 10 1991		Joint appendix filed.
11	Jan 10 1991		Brief of petitioner Michigan filed.
12	Jan 22 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Feb 1 1991		SET FOR ARGUMENT TUESDAY, MARCH 26, 1991. (2ND CASE)
14	Feb 1 1991		Record filed.
		*	Certified copy of original record received.
16	Feb 4 1991		Brief amicus curiae of Criminal Defense Attorneys of Michigan filed.
15	Feb 5 1991		Brief of respondent Nolan K. Lucas filed.
17	Feb 6 1991		CIRCULATED.
18	Feb 19 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	Mar 26 1991		ARGUED.

(1)

90-149

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

NOLAN K. LUCAS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

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---

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STATEMENT OF THE QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS VIOLATED BY EXCLUSION OF **ARGUABLY** RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE)?

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IN THE SUPREME COURT

OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

NOLAN K. LUCAS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, Petitioner, through John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Don W. Atkins, Principal Attorney, Appeals and prays that a writ of certiorari issue to review the judgment of the Michigan Court of

Appeals entered on April 23, 1987, order remanding the cause to the Court of Appeals by the Michigan Supreme Court entered on September 27, 1989, judgment and opinion (on remand) of the Michigan Court of Appeals entered on March 7, 1990 and order denying leave to appeal entered by the Michigan Supreme Court on June 5, 1990.

OPINIONS AND ORDERS BELOW

The April 23, 1987 opinion of the Michigan Court of Appeals is reported at 160 Mich.App. 692; 408 N.W.2d 431 (1987) and is appended below as Appendix A. The September 27, 1989 order of the Michigan Supreme Court is reported at 433 Mich. 878 (1989) and is appended below as Appendix B. The March 7, 1990 opinion of the Michigan Court of Appeals (on remand) is unreported and is appended below as Appendix C. The June 5, 1990 order of the Michigan Supreme Court denying leave to appeal is appended below as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 23, 1987. The Michigan Supreme Court remanded the cause to the Michigan Court of Appeals by order dated September 27, 1989. The judgment of the Michigan Court of Appeals (On Remand) was entered on March 7, 1990. The Michigan Supreme Court entered judgment denying leave to appeal on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that in all criminal prosecutions the accused shall have the right "to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

For a period of six to seven months prior to August 31, 1984, the Respondent and the complainant maintained a boyfriend-girlfriend relationship which had ended two weeks prior to that date. Late in the evening of August 31, 1984, the Respondent forced the complainant to his apartment at knifepoint where the Respondent beat the complainant and forced her to perform fellatio and to have sexual intercourse. Later that night, the Respondent forced the complainant to engage in a second act of sexual intercourse.

Defendant was charged with two counts of criminal sexual conduct in the first degree. The case was tried without a jury. The Respondent's defense at trial was that he and the complainant had

voluntary consensual sex three or four times and that he did not use a knife or other force.

On the opening day of trial, defense counsel made a motion to admit evidence of past sexual conduct between the defendant and the complainant. Based only upon the Respondent's failure to comply with the notice requirement of the rape shield law [MCL 750.520j(2); MSA 28.788(10)(2)], the motion was denied. Despite this ruling, evidence of a prior intimate relationship was admitted at trial. On May 15, 1985, the Respondent was found guilty of the lesser offense of criminal sexual conduct in the third degree as to both counts.

On April 23, 1987, the Michigan Court of Appeals reversed the Respondent's conviction and remanded the matter for a new trial on the grounds that the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional, being violative of the Respondent's right

of confrontation. This provision precludes the admission of evidence of a defendant's prior sexual contact with a complainant where the defendant fails to file a timely notice of his intent to present such evidence. The court stated, in pertinent part, as follows [People v Lucas, 160 Mich.App. 692, 694; 408 N.W.2d 431, (1987)]:

> In People v Williams, 95 Mich App 1, 9-11; 289 NW2d 863 (1980), rev'd on other grounds, 416 Mich 25 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant.

Petitioner filed a delayed application for leave to appeal in the Michigan Supreme Court on the grounds that the Court of Appeals erred holding that the notice provision of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional. The application emphasized the fact that despite having granted leave on the question of the constitu-

tionality of the notice requirement the court in People v Williams, 416 Mich. 25; 330 N.W.2d 823 (1982) specifically stated that it was unnecessary to resolve that issue because the evidence which the defendant sought to introduce was irrelevant (416 Mich at 32; 330 N.W.2d at 825).

On September 27, 1989, the Michigan Supreme Court issued the following order of remand [433 Mich 878 (1989)]:

> In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for determination of whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt.

On March 7, 1990, the Michigan Court of Appeals again reversed the Respondent's conviction and stated as follows (see Appendix C):

> As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in

which they saw each other practically every day. Their relationship experienced difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

On June 5, 1990, the Michigan Supreme Court entered an order denying Petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

MCL 750.520j(2); MSA 28.788(10)(2) provides, in pertinent part, as follows:

> If the defendant proposes to offer evidence described in subsection (1)(a) [(e)vidence of the victim's past sexual conduct with the actor] or (b), **the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof.** (emphasis added)

Even if a timely motion is filed, this subsection leaves the decision of whether to conduct an in camera hearing to determine the admissibility of the proposed evidence to the sound discretion of the trial court. Also, if new information is received during trial which may indicate the admissibility of such evidence, the trial court may in its discretion conduct an in camera hearing.

The Michigan Court of Appeals in the instant case placed its reliance almost exclusively upon that portion of the decision of another panel of the Court of Appeals in People v Williams, 95 Mich.App. 1, 9-11; 289 N.W.2d 863, 866-867 (1980) which held the notice requirement to be unconstitutional. In her dissenting opinion, then-Judge Riley noted that she would not address the issue raised by two of the defendants that their right of confrontation was

denied due to the exclusion of reputation evidence due to their failure to comply with the statute's notice provision (95 Mich.App. at 16; 289 N.W.2d at 869).

In authoring a separate opinion which agreed with the majority's decision to reinstate the defendants' conviction in People v Williams, 416 Mich. 25; 330 N.W.2d 823 (1982), Justice Kavanagh specifically addressed the question for which leave had been granted; namely, whether "the application of MCL 750.520j; MSA 28.788(10) violate[d] defendants' Sixth Amendment rights to confrontation and cross-examination". 416 Mich. at 46-47; 330 N.W.2d at 832. The "application" referred to was the trial court's enforcement of the notice requirement to bar admission of evidence of reputation evidence and prior sexual conduct between the complainant and Defendant Williams to establish consent. In flatly rejecting the majority decision by the Michigan Court of Appeals, Justice Kavanagh

explained his reasons for upholding the constitutionality of the notice provision (416 Mich. at 47-48; 330 N.W.2d at 832):

> The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an in camera determination that such evidence is more probative than prejudicial.
>
> The state has a legitimate interest in encouraging victims to report criminal sexual conduct and to assist in prosecutions therefor. So long as efforts such as this statute to further this purpose do not infringe on a defendant's constitutional right to confront his accusers and produce evidence in his own behalf, they are permissible.
>
> The procedural requirement of notice so that an in camera hearing may determine the appropriate action to serve both ends appears to us as proper and adequate.
>
> We find no error in the trial court's ruling that the evidence proffered here was inadmissible because of the failure to observe the notice requirement.

In this case, the Michigan Court of Appeals relied upon its discredited prior decision in Williams to state that the

prosecution has no need of notice in a situation where sexual conduct between the complainant and the defendant is in question.

The court also found that the statutory provision requiring an in camera hearing to determine the admissibility of such evidence (when a timely motion to admit the evidence has been filed) lacked constitutional validity because the trial court's consideration of the question of whether to admit the proffered evidence necessarily removes the issue of the relative credibility of the defendant and the complainant from the factfinder.

Rape Shield Laws have been enacted throughout the United States. Courts of the various states have repeatedly rejected claims that the statute violates an accused's Sixth Amendment right of confrontation. See e.g. Isom v. State, 655 S.W.2d 405 (Ark. 1983); Kelly v. State, 452 N.E.2d 907 (Iowa 1983); Smith v. Commonwealth, 566 S.W.2d 181 (Ky.App. 1978).

In at least eight states including Michigan, statutory provisions may be found which require the filing of a written motion to permit the defense to inquire into the prior sexual relationship between the accused and the complainant. These filing requirements establish varying periods of time within which such a motion may be filed before the commencement of trial. See Tanford and Bocchino, "Rape Victim Shield Laws and the Sixth Amendment," 128 U.of Penn.L.Rev. 544 (1980). The Federal Rules of Evidence mandate that such a motion be filed not later than fifteen days before the start of trial. 28 U.S.C.A. Rule 412(c)(1).

Other courts have rejected the claim that the application of the notice provision of a rape shield statute to preclude the introduction of evidence of prior sexual relations between the accused and the complainant is unconstitutional as a violation of the Sixth and Fourteenth

Amendments. The Supreme Courts of the State of Iowa [State v. Ogilvie, 310 N.W.2d 192 (Iowa, 1981)] and the State of Kansas [State v. Williams, 580 P.2d 1341 (Kansas, 1978)] have specifically rejected such constitutional challenges. This split between the Supreme Court of Michigan and the supreme courts of other states which have reviewed the question should be resolved.

In Smith v. Jago, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed. 2d 836 (1985), this Court denied certiorari over the dissent of Justice White, joined by the Chief Justice and Justice Brennan. In that case, the testimony of defense alibi witnesses was excluded for failure to meet a state law requirement that notice be given a particular number of days prior to trial [the state rule requiring reciprocal discovery by the prosecution of any rebuttal witnesses, see Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973)]. Exclusion of the

witnesses as a sanction was held appropriate by the federal district court in habeas and affirmed by the Sixth Circuit. Justice White's dissent from the denial of certiorari noted a split in the federal circuits as to whether "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."

The present case involves not the compulsory process clause of the Sixth Amendment, but the confrontation clause. However, the issues appear very similar. Here, the question concerns exclusion of arguably relevant evidence for failure to file a timely notice and obtain the appropriate hearing as to whether the proposed evidence in cross-examination of the victim would be relevant (it cannot be said that the defendant in such cases has lost relevant evidence; he has lost the opportunity to demonstrate its relevance).

CONCLUSION

The Federal Rules of Evidence, and many states, have rules requiring the filing of timely motions to permit the admission of evidence of prior sexual relations between an accused and a complainant, with exclusion as a remedy. Unlike Michigan, those which have considered the question have upheld the constitutionality of the notice/exclusion requirements. This Court should grant plenary review to resolve this important question.

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

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1441 St. Antoine
Detroit, Michigan 48226
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DON W. ATKINS
Principal Attorney, Appeals

Dated: July 9, 1990

TAB/DWA/mlw

APPENDICES

APPENDIX "A"

COURT OF APPEALS OPINION

April 23, 1987

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v No. 86789

NOLAN K. LUCAS,

Defendant-Appellant.

Before: J.H. Shepherd, P.J., R.S. Gribbs & R.R. Lamb,* JJ.

PER CURIAM

In a bench trial, defendant was found guilty of two counts of criminal sexual conduct in the third degree, MCL 750.520d; MSA 28.788(4). On July 2, 1985, defendant was sentenced to a prison term of 44 to 180 months. Defendant appeals by right, raising three issues, one of which requires reversal.

---

*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant's defense at trial was consent. As of August 31, 1984, defendant and complainant had been boyfriend and girlfriend for approximately six to seven months. Complainant testified that they broke up two weeks before that date. On August 31, 1984, complainant stated that defendant, at knifepoint, forced her to his apartment. Complainant testified that she was physically beaten and forced to perform fellatio and have sexual intercourse and later that night defendant again forced her to have sexual intercourse with him. Complainant, however, did not leave defendant's home until 10:00 or 10:30 p.m. on September 1, 1984. It was defendant's position at trial that he and complainant had voluntary consensual sex three or four times and that he did not use a knife or other force.

At the start of trial, defendant moved for the introduction of evidence of the prior sexual relationship between

defendant and complainant. Based solely upon the failure of defendant to comply with the notice provision of subsection 2 of the rape shield statute, MCL 750.520j; MSA 28.788(10). The trial court, without holding an in camera hearing to determine the admissibility of the proposed evidence, denied defendant's motion. This was clear legal error.

In People v Williams, 95 Mich App 1, 9-11; 289 NW2d 863 (1980), rev'd on other grds, 416 Mich 25 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant. The Court explained:

> The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings

however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time. In view of the foregoing, we find that the trial court's denial of codefendant Williams' proffered evidence represents a consideration of form over substance. The evidence should have been admitted despite noncompliance with the notice provision. This ten-day notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant." Id.

As noted by the Supreme Court in reversing the Court of Appeals, defendants in Williams sought to introduce evidence of prior sexual conduct between defendant Williams and

the complainant on the premise that such evidence would be probative to the claim of all four defendants that complainant consented to have group sexual relations with defendant Williams and his three co-defendants, one after the other. Williams, 416 Mich at 36-37. The Supreme Court found this premise untenable. Id, 37. Thus, any evidence of prior sexual conduct by complainant with Williams was properly excluded as it bore no logical relevance as substantive evidence to the Williams defendants' defense of consent to group sex. Id, 38.

The instant case was not one where complainant sought to introduce the fact of prior sexual conduct between complainant and defendant as substantive evidence that complainant would consent to any type of group sexual encounter. Here, defendant and complainant had a relationship over a considerable period of time in which they saw each other

practically every day. The evidence supported the inference that only shortly before the incident in question had their relationship experienced difficulties or ended. Consequently, the issue of consent has considerably more probative validity here than in Williams. We conclude that this Court's holding in Williams remains valid under the circumstances of this case.

As was explained in People v Perkins, 424 Mich 302, 307-308; 379 NW2d 390 (1986), while the interests sought to be protected by the rape shield statute are not involved where the proposed testimony relates to sexual activity between the complainant and the defendant, what is left is the usual evidentiary issues of the materiality of the evidence to the issues in the case and the balancing of its probative value with the danger of unfair prejudice. The trial court did not exclude the proposed

testimony here on either of those grounds. Nor does the record itself allow us to say it would have been proper for the proposed testimony to be excluded on either of those grounds. Therefore, defendant's conviction must be reversed.

Reversed and remanded.

/s/ John H. Shepherd
/s/ Roman S. Gribbs
/s/ Richard R. Lamb

APPENDIX "B"

MICHIGAN SUPREME COURT ORDER

Entered: September 27, 1989

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NOLAN KEITH LUCAS,

Defendant-Appellee.

SC: 80845
COA: 86789
LC: 84-479160

By order of July 24, 1987, the application for leave to appeal was held in abeyance pending the decision in People v LaLone (Docket No. 79221). On order of the Court, the decision having been issued on March 30, 1989, 432 Mich 103, the application is again considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for determination of whether the trial court's denial of the defendant's motion to introduce evidence regarding pas sexual relations between him and the

complainant was harmless beyond a reasonable doubt.

We do not retain jurisdiction.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis
Clerk

Seal

APPENDIX "C"

COURT OF APPEALS OPINION

March 7, 1990

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v No. 122171

NOLAN K. LUCAS, (On Remand)

Defendant-Appellant.

Before: Shepherd, P.J., and Gribbs and Maher, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and sentenced within the guidelines to a term of 44 to 180 months. Defendant appealed by right, and his convictions were reversed by this Court. People v Lucas, 160 Mich App 692; 408 NW2d 431 (1987). Following application to our Supreme Court, this matter has been remanded for our

determination whether the trial court's denial of defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt. Accordingly, we have again reviewed the entire record in this matter and we again reverse.

As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in which they saw each other practically every day. Their relationship experience difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals

goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

Reversed.

/s/John H. Shepherd
/s/Roman S. Gribbs
/s/Richard M. Maher

APPENDIX "D"

MICHIGAN SUPREME COURT ORDER

Entered: June 5, 1990

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 88649
COA: 122171
(On Remand)
LC: 84-479160

NOLAN K. LUCAS,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis
Clerk

Seal

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149 (2)

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.
_____/

ON PETITION FOR WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

RESPONDENT'S BRIEF IN OPPOSITION

PROOF OF SERVICE

MARK H. MAGIDSON (P25581)
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2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Nolan K. Lucas, who had been on bond pending this appeal, is now incarcerated in the Dekalb County Jail in Decatur, Georgia, asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's Affidavit in Support of this Motion is attached hereto.

Respectfully submitted,

BY: _____

MARK H. MAGIDSON (P25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

Dated: October 22, 1990

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____, Term, 19_____

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

v

NOLAN LUCAS

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Nolan Lucas, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

SEPTEMBER 4, 1990 - $350.00 PR. WEEK

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ✓ No ____

b. Rent payments, interest or dividends?

Yes ____ No ✓

c. Pensions, annuities or life insurance payments?

Yes ✓ No ____ VA DISABILITY 144.00 PR. MO.

d. Gifts or inheritances?

Yes ____ No ✓

e. Any other sources?

Yes ____ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

VA DISABILITY - 144.00 PR. MO.

3. Do you own any cash or checking or savings account?

Yes _____ No ✓ - Include any funds in prison accounts.

If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (excluding ordinary household furnishings and clothing)

Yes _____ No ✓

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

Nolan Lucas
NOLAN LUCAS

Subscribed and sworn to before me this 24 day of October, 1990.

Notary Public
My Commission Expires: 11-15-92

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.
_____/

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX OF AUTHORITIES

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the Michigan Court of Appeals relied on adequate and independent state grounds in finding the rape shield law of Michigan unconstitutional as it is applied to the specific facts of a complainant and defendant having had previous sexual encounters, thereby depriving the U.S. Supreme Court of jurisdiction in this matter.

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

_____/

MARK H. MAGIDSON (P25581)
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(313) 963-4311

_____/

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

Respondent, Nolan K. Lucas was convicted of two counts of third degree criminal sexual conduct, MCL 750.520(d); MSA 28.788(4). On July 2, 1985, Respondent was sentenced to a term of 44 to 180 months.

On August 31, 1984, Wanda Brown, the complaining witness in this matter and Nolan K. Lucas were "boyfriend and girlfriend" and had been dating each other for six or seven months. The testimony at trial and at the preliminary examination revealed that Ms. Brown and Mr. Lucas both lived on the same street, Rhode Island in the City of Highland Park, Michigan and that they lived only a couple of blocks from one another. Ms. Brown visited Mr. Lucas in his house four or five

times per week during the entire course of their relationship and saw each other every day. According to the testimony, during the course of their relationship, Ms. Brown visited Mr. Lucas' home over 100 times. At the preliminary examination, Ms. Brown stated that she and the Respondent had sex over 100 times. Further, she testified at the preliminary examination in this matter that the parties engaged in both "conventional, straight penal-vaginal sex as well as oral sex at different times". According to Ms. Brown, the parties had a serious relationship and talked about marrying one another.

At the time of the incident, Ms. Brown testified that she decided to walk to the store to purchase cigarettes at approximately 10:00 p.m. According to her testimony, she was walking alone that night by Mr. Lucas' home and he called to her. Ms. Brown testified that Mr. Lucas grabbed her arm, showed her a knife and told her she was coming with him to his house.

Once in the house, Ms. Brown testified that Mr. Lucas forced her to disrobe, poured drinks for the two of them and then forced to perform various sexual acts, including oral and vaginal sex. Ms. Brown stayed in the house with Mr. Lucas for approximately 24 hours. During this 24 hours, Mr. Lucas left Ms. Brown alone at least three different times when he went to the cellar for more wine. Thereafter, according to Ms. Brown's testimony, the parties went to sleep on a sofa couch. They awoke the following morning at approximately 10:00 a.m.

During this period, Ms. Brown stated that Mr. Lucas was very angry regarding a person named "Ricky" whom the Respondent

suspected of being Ms. Brown's new lover. She testified that after Mr. Lucas poured them wine, he asked her what was going on between her and Ricky.

Mr. Lucas testified on his behalf and confirmed that the parties had a very close relationship and that he had considered marrying the complainant. Mr. Lucas admitted to having seen Ms. Brown on August 31, 1984 and that they did in fact have sexual intercourse. His defense to this matter was consent.

Mr. Lucas initially had retained counsel to represent him in this matter, however, according to the Court records, the arraignment on the information was held on October 25, 1984 and on November 8, 1984, his retained counsel withdrew. On February 8, 1985, the trial court appointed an attorney to represent Mr. Lucas. At trial, which commenced on May 14, 1985, Mr. Lucas' trial attorney made a motion to allow evidence and testimony of the parties' prior sexual intercourse. In denying the motion, the trial court stated that the motion should have been filed within ten days of the arraignment on the information as required by MCLA 750.520(j); MSA 28.788(10), which is known as the rape shield law. This statute requires that upon motion, the court can hold an in camera hearing to determine the admissibility of said evidence where the motion is made within ten days of the arraignment on the information.

The defendant appealed his conviction as of right and his convictions were reversed by the Michigan Court of Appeals. People v Lucas, 160 Mich App 692, 408 NW2d 431 (1987).

Thereafter, the People applied to the Michigan Supreme Court for review and the matter was remanded to the Court of Appeals to determine whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between the harmless beyond a reasonable doubt. In an Order and Opinion dated March 7, 1990, the Michigan Court of Appeals reviewed the entire record and determined that since the question of prior sexual relations between these individuals goes to the issue of credibility and since credibility was central to the case, the Court "cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt". In an Order dated June 5, 1990 the Michigan Supreme Court denied further application for leave because "We are not persuaded that the questions presented should be reviewed by this Court".

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN COURT OF APPEALS RELIED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING THE NOTICE PROVISION OF THE RAPE SHIELD LAW UNCONSTITUTIONAL, AND FURTHER, THE GROUNDS FOR THE DECISION ARE NARROW AND LIMITED TO THE FACTS OF THIS PARTICULAR TYPE OF CASE, THEREBY DEPRIVING THE SUPREME COURT OF JURISDICTION IN THIS MATTER.

The Michigan Court of Appeals in reversing the trial court relied upon existing adequate state law in reversing the trial court. Further, the basis for the Michigan Court of Appeals decision was limited to very narrow and specific facts.

The Court of Appeals relied upon another Michigan Court of Appeals case in the initial decision in this matter. The Michigan Court of Appeals relied upon People v Williams, 95 Mich

App 1, 289 NW2d 863 (1980), rev'd on other grds, 416 Mich 25 (1982). The Williams court found the ten day notice provision unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant. The Michigan Court of Appeals in the instant case cited with approval the language contained in Williams as follows:

> The object behind the imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings however, when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a co-defendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a co-defendant. Requiring notice in this situation, then, would serve no useful purposes. There would be no witnesses to investigate and, thus, no necessity for preparation time. ...this ten-day notice provision loses is constitutional validity when applied to preclude evidence of previous relations between the complainant and a defendant.

People v Williams, supra, 9-11.

In this matter, a state court is simply in effect deciding an evidentiary question. As has been noted throughout the record, this is a case of a "boyfriend/girlfriend situation". The parties had been intimate for several months. The defendant's defense at trial was consent. There was evidence that they had recently broken up. The credibility of each witness was central in this matter. Without the trial counsel having the ability to inquire regarding the prior relationship

between these same parties, the defendant was irreparably prejudiced. Further, in addition to the question of consent, inquiry into the prior relationship was important for the reason that it could have helped to establish a motive for the complainant to make false statements against the defendant.

The courts in Michigan have consistently interpreted the validity of the "rape shield law". The Respondent acknowledges that prior decisions in Michigan have upheld the constitutionality of the restrictive evidence provisions contained in MCL 750.520(j) as it pertained to evidence of prior sexual relations between a complainant and third parties. People v Hackett, 421 Mich 338, 365 NW2d 120 (1984); People v Kahn, 80 Mich App 605, 264 NW2d 360 (1978). Further, Respondent acknowledges the laudatory purpose of the rape shield law which was designed the encourage the reporting of sexual assaults, to protect the privacy rights of the complainant and to prevent harassment and humiliation of the complainant on the witness stand. People v Kahn, supra. However, these are state issues with state purposes and have been decided in a manner consistent with state law in this matter.

Here, Respondent Lucas sought to cross examine complainant regarding the lengthy and frequent sexual relationship. This is different than the other cases which have upheld the constitutionality of the rape shield statute. In the other cases, such as People v Hackett, the issue concerned the victim's prior sexual conduct with persons other than the defendant. Here, defendant Lucas did not want to introduce this

evidence to show poor character or bad reputation of the complainant. Rather, Lucas sought to cross examine the complainant on this issue to show bias or ulterior motive or a motive for making a false accusation to the police.

In fact, Michigan courts, including the Supreme Court has consistently followed the same principle as the Court of Appeals concluded in Williams. For instance, in People v Perkins, 424 Mich 302, 375 NW2d 390 (1986), the Michigan Supreme Court held that the interest sought to be protected by the rape shield law are not involved where the proposed testimony relates to the sexual activity between the complainant and the defendant. In Perkins, the defendant sought to introduce evidence of a previous sexual encounter between him and the complainant to show a pattern of sexual activity. The trial court found that not to allow the defendant to testify would deprived him of his defense of consent. The Supreme Court concluded that inquiry into the prior sexual relationship between the parties, "is material to the issue of consent and more probative than prejudicial and the testimony should come in for that purpose". Id 305. The court in Perkins concluded that if a fact finder were to believe the defendant's description of the encounter of a previous sexual relationship, then that evidence could influence the fact finder's decision regarding whether the act complained of was an assault or consensual.

Here, the Michigan courts have been deciding the Michigan statute and interpreting its requirements for many years. Michigan courts are familiar with the purpose of Michigan

rape shield law. The Michigan courts were familiar with the purpose of having a ten-day notice requirement in that it would enable a prosecutor to locate other potential witnesses, if, after an in camera hearing, the trial judge was going to permit such evidence. However, as the court correctly analyzed in Williams, and which the court in the instant case concurred, no real purpose exists where the only witness is the complainant herself. There would be no other witnesses to interview and there would no unfair surprise to the prosecutor since it is the prosecutor who was familiar with the testimony of the complainant.

Not only have the Michigan courts interpreted the Michigan law, but this is a very narrow issue. This is not a complete overruling of the rape shield law; on the contrary, it is merely a simple evidentiary matter that has been resolved. The issue is very narrow and the facts are very specific. The Michigan courts have concluded that where the parties were once intimate, then there is no logic to have a ten-day notice requirement, and, inquiry into the prior sexual relationship would be more probative than prejudicial. These are the same basic evidentiary issues that are faced by trial courts and state appellate courts in almost every trial. These are not the type of issues that are considered by the U.S. Supreme Court. The Petitioner's attempt in this matter to convert a case decided on state evidentiary law into federal constitutional law must fail.

This court does not have jurisdiction where the decision below is based on adequate and independent state

grounds. In fact, this court held in Herb v Pitcarin, 324 US 117, 89 L Ed 789, 65 S Ct 459 (1945) that the Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. This principle was reaffirmed in Fay v Noria, 372 US 391, 9 L Ed 2d 837, 83 S Ct 822 (1963).

Even where the judgment of a state court rests upon two grounds, one which is federal and the other non-federal, jurisdiction fails if the non-federal ground is independent and adequate. Fox Film Corp. v Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935). In the instant case, the Michigan Court of Appeals relied upon prior state Supreme Court interpretations and decisions. Therefore, jurisdiction in this Court does not lie. Michigan v Long, 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983). Accordingly, the People's Petition must be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for writ of certiorari.

Respectfully submitted,

BY: _____

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Dated: October 22, 1990

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

After first having been duly sworn, Mark H. Magidson deposes and says that on the 23rd day of October, 1990 he served On Petition for Writ of Certiorari to the Michigan Court of Appeals, Motion for Leave to Proceed in Forma Pauperis, Affidavit in Support of Motion to Proceed in Forma Pauperis, and Respondent's Brief in Opposition upon:

Timothy Baughman, Esq.
Chief of Criminal Division, Research
Training and Appeals
1441 St. Antoine, 12th Floor
Detroit, MI 48226

by enclosing said documents in an envelope addressed as set forth above and depositing same in the U.S. Mail, with first class postage prepaid thereon.

MARK H. MAGIDSON

Subscribed and sworn to before
me this 23rd day of October, 1990.

LEONORA KING, Notary Public
Wayne County, MI
My commission expires: 11/2/92

(4)

IN THE SUPREME COURT OF THE UNITED STATES

NO. 90-149

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF MICHIGAN
PETITIONER,

v

NOLAN K. LUCAS
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
July 16, 1990
CERTIORARI GRANTED,
November 26, 1990

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9/14/84:	Defendant retains own counsel (Kenneth V. Cockrel)
9/18/84:	Preliminary examination held
10/25/84:	Arraignment on information
11/14/84:	Order to adjourn trial granted in order to conduct polygraph examination granted (Kenneth V. Cockrel)
1/31/85:	("Case Inquiry") Assigned for trial (Attorney: Gayle Fort Williams)
2/8/85:	Order to adjourn trial granted due to recent appointment of new attorney
2/8/85:	Substitution of attorney (by Gayle Fort Williams)
5/14/85:	Waiver trial held
5/15/85:	Waiver trial held, defendant convicted
7/2/85:	Defendant sentenced to two concurrent terms of 3 years, 8 months to 15 years

4/23/87: Conviction reversed by the Michigan Court of Appeals

9/27/89: Michigan Supreme Court remands case to the Michigan Court of Appeals for harmless error analysis

3/7/90: On remand, conviction reversed by Michigan Court of Appeals

6/5/90: Leave to appeal denied to the Prosecution by the Michigan Supreme Court

MOTION TO ALLOW EVIDENCE OF PRIOR SEXUAL INTERCOURSE

THE CLERK: The People versus Nolan Lucas, Case No. 84 479160.

(Defendant and both counsel present in the court room.)

THE COURT: Is there a motion to be placed on the record?

MS. WILLIAMS: Yes, Your Honor, Gayle Williams for the defendant.

Your Honor, I am asking that the Court allow, throughout this trial, testimony concerning prior sexual intercourse between the defendant and the complainant, even though I know it goes against the Statute.

First of all, I would like to say that past the time that a motion could have been made I was appointed as counsel for the defendant. Secondly, much of what the defendant has to testify to concerns the relationship he had with the complainant over a very long period of time.

THE COURT: Your motion is what?

MS. WILLIAMS: For you to allow evidence, testimony of the prior sexual intercourse together.

THE COURT: With the complainant?

MS. WILLIAMS: Yes.

MR. THOMAS: Good morning, Your Honor. Philip Thomas, on behalf of the People.

Your Honor, I would like to direct the Court's attention to MCLA 750.520(j). I would state to the Court that the language contained in there regarding prior sexual conduct with anyone in the world, even if it's the defendant is clearly laid out as far as procedures to be followed. The Statute says if defense counsel intends to use or go into any past sexual contact with any one, as I said, in the world, including the defendant, a motion has to be filed -- the Statute says shall be filed within 10 days of the arraignment on the information. I understand that Miss Williams was appointed

after Mr. Cockrel had already conducted the preliminary examination and part of the arraignment on the information, however, we have had a lot of time to lapse between the time that she was appointed and today's date.

The only other factor I would like to point out to the Court is that the Michigan Court of Appeals, as well as Supreme Court, have held over and over again that those rights that are referred to in our Rape Shield Statute are rights that belong to complaining witnesses in these criminal sexual conduct cases. They are not rights to be taken lightly and even waived by prosecutors in trials like this. Those are rights that belong to the complainant, Miss Wanda Brown, in this case, and I feel obliged to object to counsel's motion.

MS. WILLIAMS: Your Honor, I understand the untimeliness of my motion, but certainly Mr. Lucas has rights too, and that is the right to defend himself as

vigorously as he possibly can. Secondly, he has the right to freedom.

Much of Mr. Lucas' defense, as I said, centers around the sexual intercourse that he did have in previous months prior to the day of the incident.

THE COURT: Why was not this motion made earlier?

MS. WILLIAMS: Your Honor, I was not aware that I could have made it because Mr. Lucas had a different attorney. In fact, I was appointed to this case one week prior to trial initially when he had his first attorney.

THE COURT: Let me check the Statute. If the Statute says I am precluded from it -- are you familiar with it?

MS. WILLIAMS: Yes.

THE COURT: What does it say?

MR. THOMAS: 750.520(j). It's not in the volume, Your Honor. It's in the advanced pocket part to the Statute. The supplement to volume 39, Your Honor.

THE COURT: None of the requirements

set forth in 750.520(j), subsection 2, have been complied with; and among others, other than filing 10 days after the arraignment on the information, that is, the Court should have an in camera hearing on the evidence, which has not been done. Unless this information is filed or discovered during the course of the trial, I would have to (sic) right to go into that, but your motion is respectfully denied.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 90-149

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

NOLAN K. LUCAS

RESPONDENT

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONER

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STATEMENT OF THE QUESTION

ARE EITHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OR THE RIGHT TO PRESENT A DEFENSE VIOLATED BY THE EXCLUSION OF **ARGUABLY** RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OR IN CONTRADICTION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE)?

OPINIONS AND ORDERS BELOW

The April 23, 1987 opinion of the Michigan Court of Appeals is reported at 160 Mich.App. 692; 408 N.W.2d 431 (1987) and is appended as Appendix A in the Petition for Certiorari (pp. 1a-7a). The September 27, 1989 order of the Michigan Supreme Court is reported at 433 Mich. 878; 446 N.W.2d 291 (1989) and is appended as Appendix B in the Petition for Certiorari (pp. 8a-9a). The March 7, 1990 opinion of the Michigan Court of Appeals (on remand) is unreported and is appended as Appendix C in the Petition for Certiorari (pp. 10a-12a). The June 5, 1990 order of the Michigan Supreme Court denying leave to appeal is reported at 434 Mich. 925; ___ N.W.2d ___ (1990) and is appended as Appendix D in the Petition for Certiorari (p. 13a).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 23, 1987.

The Michigan Supreme Court remanded the cause to the Michigan Court of Appeals by order dated September 27, 1989. The judgment of the Michigan Court of Appeals (On Remand) was entered on March 7, 1990. The Michigan Supreme Court entered judgment denying leave to appeal on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C., s. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that in all criminal prosecutions the accused shall have the right "to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATUTORY PROVISION INVOLVED

Mich.Comp.L.Ann. Sec. 750.520j;

Mich.Stat.Ann. Sec. 28.788(10) provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

STATEMENT OF THE CASE

The Respondent, Nolan K. Lucas, was charged with two counts of criminal sexual conduct in the first-degree which were alleged to have occurred on August 31, 1984.

On September 14, 1984, Lucas secured the services of retained counsel (J. A. 2). On September 18, 1984, a preliminary examination was held in the Thirtieth District Court. The complainant, Wanda Brown, testified that for a period of approximately six to seven months before the date of the offense she and Lucas had been "dating". They had a boyfriend-girlfriend relationship [R. (Prel.Exam.) 4]. On cross-examination, Brown stated that she and Lucas had had sexual intercourse over one hundred times "(b)oth conventional, straight penal-vaginal sex, as well as oral sex, at different times" [R. (Prel. Exam.) 23]. She repeated the fact that a boyfriend-girlfriend rela-

tionship had existed and that they had talked of marriage [R. (Prel.Exam.) 24]. Brown denied that she was using the criminal justice system "to get revenge" [R. (Prel.Exam.) 35] or that she was jealous or that she had "fabricate(d) this story to punish him" [R. (Prel.Exam.) 41].

The Respondent testified that their relationship included repeated acts of sexual intercourse [R. (Prel.Exam.) 59]. As to the events of August 31, 1984, he stated that their was no coercion and that they had a voluntary consensual sexual encounter "the same way it had been just about every night before then, freely" [R. (Prel.Exam.) 62].

At the conclusion of the hearing, the Respondent was bound over for trial in circuit court on the charges contained in the complaint [R. (Prel.Exam.) 76].

On October 25, 1984, Mr. Lucas was arraigned on the information. (J. A. 2).

On November 14, 1984, a motion to adjourn the trial for the purpose of con-

ducting a polygraph examination, filed by the Respondent's retained attorney, was granted by the circuit court (J. A. 2).

On February 8, 1985, the trial date was again adjourned as the result of the entry of a substitution of counsel. On that date, newly-appointed counsel (Gayle Fort Williams) entered her appearance (J. A. 2).

On the opening day of trial, defense counsel made an oral motion to admit evidence of past sexual conduct between the Lucas and the complainant. Due to the Respondent's failure to comply with the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2), the motion was denied (R. 3-6). Defense counsel did not request a continuance. Instead, the Respondent waived his right to be tried by a jury (R. 6-8). The matter was then heard by the Honorable Charles Farmer, Judge of the Wayne County Circuit Court, on May 14-15, 1985.

The complainant testified that she

had known the Respondent (who was known to her as "Chris") for six or seven months a "boyfriend-girlfriend" relationship had existed (R. 10-13). About two weeks before the date of the offense, the relationship was terminated (R. 11-12).

On the night of August 31, 1984 at about 10:15 p.m., Brown was walking to a corner gas station to buy cigarettes when the Respondent came out of his house and "abducted" her (R. 14). He grabbed her by the arm and held a knife in his hand (R. 15). While still armed with the knife, he took her into the dining room of his house and ordered her to remove all her clothing. Brown stated that this was against her will (R. 17, 20). She was then taken into the living room where Lucas poured two glasses of wine. She drank some of the wine in the glass he gave her (R. 19, 21). At one point, the Respondent opened a window slightly and that she heard the voice of a neighbor. Brown was going to call out but Lucas put

his hand on her neck, digging his fingernails into her flesh, and placed the knife to her neck (R. 22-23).

Throughout the time that Brown was with Lucas (about twenty-four hours), he repeatedly accused her of having had sex with a man named "Ricky" (R. 24-25, 28, 34, 111).

Brown testified that Lucas hit her with his closed fist four or five times in the right eye and then forced her to engage in an act of fellatio and an act of vaginal intercourse (R. 26-30, 32). Her right eye was blackened and she had a swollen face and bruised head as a result of being hit by him (R. 27). During the acts of penetration the knife was placed on the floor and was about twelve inches from their heads (R. 33).

About 1:00 a.m. on the following morning, Lucas struck her in the area of the right eye about seven more times. He then put his penis into her vagina. Ms. Brown testified that the knife was open

and lying on a coffee table at that time (R. 36-38).

Brown testified that she did not make any attempt to escape because she was afraid of him and because he had the key to the deadbolt lock on the front door in his pocket (R. 41-42). On cross-examination, she testified:

> "Q. Did you make an attempt to escape through the windows?
> "A. No, I thought about it, but I didn't do it.
> "Q. Why didn't you?
> "A. Because I was petrified. Chris [Respondent] stands about 6 feet tall. He had a knife in his hand. I am 5 feet even, about 100 pounds, and if I tried to escape but didn't escape, I thought he might try to kill me or hurt me seriously." (R. 79-80).

Her fear and the security locks on the house also kept her from trying to escape during the two or three times that Lucas went into the cellar for more wine (R. 80).

In the evening of September 1, at about 5:00 p.m., the Respondent called the complainant's mother and told her

that Brown had been injured slightly in a robbery attempt the night before. Brown testified that Lucas told her she could either consent to this story or he would "... make one phone call and somebody would have my mother ripped off and my kid snatched off the street." (R. 45)

Brown testified that after Lucas called her mother she slept for a while. When she woke up the Respondent walked her home. She stated that he had acted as though nothing had happened the prior night (R. 104). She testified that at that time her face was swollen, her head hurt, and her right eye was bruised (R. 47). When she got home, she did not tell her family what had happened because she was afraid, angry, and because her young son was there and she did not want him to see her or to know what had happened (R. 50).

On September 4, 1984, Brown filed a complaint with the police, She decided to go to the police because the day be-

fore the Respondent had repeatedly called her at work harassing and threatening her (R. 51). Prior to that time, her fear that Lucas would carry out his threats against her family had kept her silent (R. 51).

Brown testified that the police took a photograph of her face (R. 48-49). On cross-examination, she further explained the reason for the delay in reporting the incident:

> "Q. Why didn't you have a photo taken on the first, second or third?
> "A. Because I was petrified. I was scared to death. The only thing I wanted to do is put as much distance between him and myself.
> "Q. How did you become unafraid?
> "A. When I was sitting at work, at my typewriter, I kept thinking this man has threatened my life, my mother's and my son's. There is no man in my home. My child walks back and forth to school everyday. I met him under an alleged name, under family members that he claims were aunts and sisters, and all that was a lie. So I didn't know what route he would take, and I really didn't care what he would really do to me. At that point I said to myself I couldn't live like this. I couldn't work and be worried about my kid, calling the school every day having the principal go out of his way, meeting my boy halfway." (R. 112-113).

Brown stated that she believed his threats against her in part because he had used the knife to make superficial cuts on his own wrists. She testified that he told her he was not afraid to die while he did this (R. 114). Brown was examined by her family physician after talking to the police (R. 52).

On cross-examination, Brown stated that before her relationship with Lucas had ended they would see each other every day (R. 62). She liked him, cared for him, and was fond of him during the relationship (R. 66). She explained that he had harassed her throughout the two weeks between the time the relationship ended and the time of the assaults (R. 66-67, 69-70).

Brown denied that she had brought the charges against him as revenge for his having broken off their relationship.

She denied having thought that he was seeing other women during their relationship. She denied using the court to punish him (R. 109-110, 113).

Dr. Michael Sampson testified that he examined the complainant on September 4, 1984. He testified that her right eye was swollen and bruised and that there were abrasions on the right side of her neck (R. 91). The doctor was of the opinion that these injuries were from two to five days old (R. 94-95). The pelvic examination which he conducted revealed no evidence from which to conclude that a sexual assault had or had not occurred (R. 92).

Mary Simmons, Ms. Brown's mother, testified that her daughter left the house on the evening of August 31 to buy cigarettes (R. 116). She stated that her daughter did not have any noticeable injuries on her face or neck at that time (R. 117). When she next saw her daughter the following evening, she was bruised

and scratched. Her daughter refused to talk about what had happened to her (R. 124).

Ms. Simmons stated that Lucas called her between 4:00 and 6:00 p.m. and told her that her daughter was resting at his house. He told her that she had been attacked the night before (R. 118-121). She stated that her daughter and the Respondent had a "boyfriend-girlfriend" relationship previously (R. 125).

Karen Barden, a detective with the Highland Park police force, took a report from Brown on September 4, 1984 (R. 133-134). She took a photograph of the bruises and scratches she saw on the complainant. Officer Barden testified that the photograph did not reflect the severity of the complainant's injuries (R. 136).

On September 5, 1985, Officer Barden arrested Lucas at his home. During a patdown search of the Respondent, she found the knife that was identified by

the complainant as the one used against her (R. 138-139).

After issuing "Miranda warnings", Officer Barden took a statement from the Respondent (R. 140-145). In his statement, Lucas told the officer that he was engaging in an act of consensual sex with the complainant when Brown called him "Ricky" several times. He said she slapped him and he slapped her back. After that they continued to have consensual sex. He said that they planned to tell Ms. Brown's mother that she had been robbed because they did not want her to know that Ms. Brown was pregnant for the second time. Lucas told Officer Barden that this was a result of his home having been bombed by the complainant (R. 146).

Barden testified that she saw no evidence of burning at the Respondent's house (R. 147). She testified that she saw scratches on his wrists. Her efforts to take a picture of him failed (R. 152-155).

The Respondent testified that he first became acquainted with the complainant during the second week of April, 1984 (R. 163). He testified that they frequently visited each other, that they were very close, and that he intended to marry Ms. Brown (R. 164, 166, 216). He testified that he asked Brown's mother for permission to marry her (R. 167).

Lucas testified that he and the complainant engaged in three or four separate acts of consensual sexual intercourse on August 31, 1984 (R. 168). He engaged in some of those acts after the complainant called him "Ricky" and after he had slapped her (R. 226). Lucas stated that he slapped the complainant only once with his open hand (R. 205-206, 212, 215). He testified that the photograph of the complainant made her bruises look much worse than they were (R. 213). He stated that he saw no injuries on her neck when she left on September 1 (R. 214).

The Respondent testified that he and the complainant made up the story about her having been robbed because of her mother. He explained that Brown had previously told him that she was pregnant with his child. He said that she told him that night that the baby was another man's child (R. 207). He said that they talked about who would be the father to the child. He told the complainant that he would not act as the child's father and that he was going to tell Brown's mother this (R. 208). He said that at about 6:00 p.m. he called the complainant's mother and told her that he was not the father of the child (R. 209-210).

Lucas testified that the knife in question was Ms. Brown's knife. He had borrowed it but failed to return it (R. 193-194). He also testified that the scratches on his wrists were made by a kitten (R. 197).

The Respondent stated that there were no locks and keys for the windows

(R. 170, 177-178); that there are no security bars on his home (R. 174-175); that the key to the deadbolt lock on the door is always left hanging on a string next to the door (R. 221-222); and, that the gate to the patio is left unlocked (R. 172).

Lucas said that there were problems in his relationship with the complainant because she became possessive and jealous of him (R. 181). He said that she had gotten into a physical fight with another woman over him because he had talked to that woman at a party (R. 182). He stated that another reason there were problems in their relationship was because Brown had given him gonorrhea (R. 182). Lucas testified that he had been seen by a doctor at the Herman Keifer Clinic because of symptoms of burning on urination and discharge (R. 190). He stated that he was treated with tetracycline pills (R. 190-191).

In rebuttal, it was stipulated that

had Dr. Michael Sampson been recalled to the witness stand he would have testified that the complainant did not have any venereal disease and that she was not pregnant when he examined her (R. 233-234). Brown testified, on rebuttal, that she was not pregnant and that she had not had a venereal disease (R. 235-236).

Officer Barden testified that the scratches on the Respondent's wrists were extremely straight. She testified that she had previously seen scratches left by kittens and that she did not feel that the scratches on his wrists were made by a kitten (R. 242-243).

After the closing arguments of counsel, the court found the Respondent guilty of two counts of criminal sexual conduct in the third degree. The judge stated that he had some doubt concerning the presence of a weapon during the acts of penetration. While he noted that there were minor inconsistencies in her testimony, the complainant was found to

be credible. The judge noted that the injuries to the complainant's face were consistent with a "brutal blow" (R. 262-266).

On July 2, 1985, the Respondent was sentenced to a term of imprisonment of from three years and eight months to fifteen years (R. 285).

The Respondent's conviction was reversed and the matter was remanded for a new trial by the Michigan Court of Appeals which concluded that the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional when applied to exclude evidence of prior sexual relationship between a defendant and a victim. People v. Lucas, 408 N.W.2d 431 (Mich.App. 1987) (Petition for Certiorari, pp. 1a-7a).

After having held the Petitioner's application for leave to appeal in abeyance pending the court's decision in People v LaLone (Docket No. 79221), the Michigan Supreme Court remanded the case

to the Court of Appeals to determine "whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt." (Petition for Certiorari, pp. 8a-9a).

On remand, the Michigan Court of Appeals again reversed the Respondent's conviction, stating that "(s)ince the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972)." (Petition for Certiorari, p. 12a).

The Michigan Supreme Court denied leave. (Petition for Certiorari, p. 13a).

This Court then granted the Petition for Certiorari.

SUMMARY OF ARGUMENT

The issue presented in this case is whether the Confrontation Clause of the Sixth Amendment or the right to present a defense is violated by the exclusion of arguably relevant evidence to be used on cross-examination or in contradiction of a sexual assault for the failure to file a required notice of intent to employ such evidence and, thus, obtain a pre-trial hearing on its admissibility/legal relevance. The Michigan Court of Appeals answered this question in the affirmative in this case and further held that the erroneous exclusion of the evidence was not harmless beyond a reasonable doubt. Petitioner disagrees.

The right to confrontation ensures an accused the "opportunity" to conduct an effective cross-examination of adverse witnesses. Also, the Sixth Amendment implicitly assures the defendant that he will not be prevented from presenting relevant evidence in his own behalf.

The rape shield law is intended to protect a sexual assault victim from having to expose her sexual history when it is irrelevant to the issue of the accused's guilt or innocence. It avoids any undue harassment of the victim and excludes evidence which is misleading, inflammatory, and of minimal probative worth.

Petitioner submits that this law, however, does not in any way infringe upon the accused's right to confrontation since it provides a procedural mechanism whereby probative evidence may be shown to be admissible. All that a defendant is required to do is show a legitimate need for the evidence (that it is legally relevant to the defense asserted) and that it is therefore more probative than prejudicial.

Petitioner further submits that each procedural rule, including the notice requirement, is a valid and essential means to protect the victim of rape while

insuring the constitutional rights of the accused. The notice requirement prevents unwarranted surprise by permitting the prosecution to conduct its own investigation of the proposed evidence in order to challenge its admissibility. Where the actions or omissions of the accused are clearly inexcusable, preclusion of such evidence for failure to file a timely notice is not an unreasonable remedy.

Lastly, Petitioner submits that where, as in the instant case, it can be shown that the accused was in no way prejudiced by the preclusion of evidence there has been no violation of the right to confrontation or of his ability to present evidence in his defense.

ARGUMENT

NEITHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT NOR THE RIGHT TO PRESENT A DEFENSE ARE VIOLATED BY THE EXCLUSION OF ARGUABLY RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OR IN CONTRADICTION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE).

I. THE RIGHT TO CONFRONTATION.

The Confrontation Clause of the Sixth Amendment, guarantees the accused the right to confront the witnesses against him. California v Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934 (1970). The primary purpose of the confrontation guarantee is to give the defendant the **opportunity** to cross-examine the witnesses against him. Davis v Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110 (1974):

> "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" (emphasis in original).

In Chambers v Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973), this Court observed that the right to confront and the extent of cross-examination is not limitless:

> "The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. ... But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." 410 U.S., at 295, 93 S.Ct., at 1046.

Thus, as noted by this Court in Delaware v Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986), a trial court may impose reasonable limits upon inquiry into the potential bias of a prosecution witness which include such factors as:

> "... harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that (would be) repetitive or only marginally relevant ..." 475 U.S., at 679, 106 S.Ct., at 1435.

Consequently, even relevant evidence may be barred as long as the defendant is

not prohibited outright from utilizing the opportunity to present the evidence or offer proof of its relevance. "Stated otherwise, neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to admit all relevant evidence or cross-examine on any subject." People v Hackett, 365 N.W.2d 120, 124 (Mich. 1984).

Again, it is the "opportunity" which must be afforded the defendant to cross-examine adverse witnesses which is of paramount concern in the context of the Sixth Amendment. This principle was stated in the following manner by this Court in Delaware v Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985):

> "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [474 U.S., at 20, 106 S.Ct., at 294] (emphasis in original).
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> * * *
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> "(T)he Confrontation Clause is generally satisfied when the

> defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." [474 U.S., at 22, 106 S.Ct., at 295].

In accord with these principles, the Court reviewed the petitioner's sodomy conviction in the recent case of Olden v Kentucky, 488 U.S. ___, 109 S.Ct. 480 (1988). There, the defense asserted was consent. Olden's theory of the case was that the complainant had fabricated the rape and sodomy charges to protect her relationship with her boyfriend. Defense counsel contended that in order to show the complainant's motive to lie it was necessary to introduce evidence of the fact that the complainant and her boyfriend were then living together. Finding that the prejudicial nature of the evidence outweighed its admittedly probative value, the trial court granted the prosecution's motion in limine to keep all evidence of current cohabitation from

the jury.[1]

As the Confrontation Clause includes the right to conduct "reasonable" cross-examination (488 U.S., at ___, 109 S.Ct., at 483), the Court found that an absolute ban on any inquiry into the complainant's living arrangement for the stated purpose of demonstrating the complainant's motive to lie was "beyond reason". (488 U.S., at ___, 109 S.Ct., at 483). Implicit in the Court's holding was the fact that the petitioner had made a clearly sufficient showing of the unique relevance of the proffered evidence to the central issue in the case. Because of this, a harmless error analysis could not be applied. Delaware v. Van Arsdall, 488 U.S., at ___, 109 S.Ct., at 483-84.

What is clear from this line of authority is that a defendant must be

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1. This Court noted that the state appellate court specifically held that the evidence of cohabitation at the time of trial was not barred by the state's rape shield law.

permitted to pursue a course of cross-examination which is both effective and reasonable as it relates to issues which are crucial to the case against him. However, even evidence which may be characterized as legally or logically relevant may be excluded if it runs afoul of legitimate state interests. Where these two interests collide, a court must undertake an analysis of the competing interests in order to strike a balance which will ensure that the right to a fair trial is not denied either to the accused or to the state.

As an integral part of the "interest balancing process", legislative and judicial bodies may promulgate rules which are designed to foster an informed determination without infringing upon a defendant's right to confrontation. To provide for an orderly determinative process which is fundamentally fair to both parties, such rules may require a pretrial hearing to test the relevance of

proposed evidence to the actual issues in the case.[2]

Frequently, these procedural prerequisites will include a provision for notice which is intended to avoid the unnecessary and unjust surprise which would otherwise befall the opposing side. A notice provision also ensures that the opponent of the proffered evidence will be provided with sufficient time to conduct its own review of the evidence and to gather additional evidence to rebut the claim of admissibility. It also ensures that inadmissible evidence

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2. "The in camera hearing ... is an important safeguard as it provides the least drastic infringement on the defendant's rights when there is relevant evidence applicable to a truth-seeking exception. Certainly, the state's interest ... together with the safeguards set out in the statute balances the scales in favor of such a state interest and thereby does not infringe upon the Appellant's Sixth Amendment rights. The defendant's right to confront and cross-examine witnesses concerning the victim's past sexual behavior with others must bow to accommodate the state's interest in the Rape Shield Statute." Harris v State, 362 S.E.2d 211, 213 (Ga. 1987).

will be rejected before being placed before the jury which will otherwise cause prejudicial, and often irreparable, harm to the opponent of the evidence.

The overriding concern of such rules is the preservation of the parties' right to a fair trial. One such rule is the rape shield law.

II. RAPE SHIELD LAWS AND NOTICE PROVISIONS.

Prior to the adoption of rape shield laws, the prevalent view was that opinion and reputation evidence of a victim's consensual sexual activity was probative of a woman's consent with a defendant and of her credibility as a witness. See 2 Weinstein & Berger, Evidence, s. 412[01], pp. 412-10. Later, a critical evaluation of such a rule of evidence and an evolving theory that sexuality was clearly distinct from crimes of sexual violence compelled the Michigan Legislature to enact sweeping reforms of the rape laws

in 1974. Aside from "redefining the crime of 'rape' into the more expansive and gender-neutral concept of criminal sexual conduct, the Legislature also tailored the evidentiary considerations in sexual-assault prosecutions to focus upon the merits of the accused's guilt or innocence rather than the victim's behavior." People v LaLone, 437 N.W.2d 611, 619-620 (Mich. 1989).

In addressing the defendant's claim that the rule set forth in Michigan's rape shield law [M.C.L.A. Sec. 750.520j; M.S.A. Sec. 28.788(10)] which excluded evidence of a complainant's previous sexual conduct with persons other than the defendant violated his constitutional right to confrontation, the court in the case of People v Khan, 264 N.W.2d 360 (Mich.App. 1978) noted the purposes of the act:

> "(W)e observe that this provision--an integral part of Michigan's criminal sexual conduct act--represents an explicit legislative decision to eliminate trial practices under

> former law which had effectually frustrated society's vital interest in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
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> * * *
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> "'Primarily, *** [rape shield statutes] serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment. In line with these goals, they encourage the victim to report the assault and assist in bringing the offender to justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government's aim of deterring would-be rapists as well as its interest in going after actual suspects. These statutes are also intended, however, to bar evidence that may distract and inflame jurors and is of only arguable probative worth. To the degree that they aid in achieving just convictions and preventing acquittals based on prejudice, they naturally further the truth-determining function of trials in addition to more collateral ends.'" 264 N.W.2d at 364.

Since Michigan's enactment of its rape shield statute, similar provisions have been adopted in each state and by the federal government (Fed.R.Evid. 412). Comment, "The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation", 78 J.Crim.L.&Criminology 644 (1987).

From the position taken under former law which espoused a rule of inclusion, the current rule which favors exclusion of such evidence has arisen. It is, however, a rule which is not unmindful of the confrontation rights of the accused. As noted in People v Hackett, 365 N.W.2d 120, 125 (Mich. 1984):

> "The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and **should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation**." (emphasis added)

Despite challenges to the constitutionality of rape shield laws based upon a claim that they violate the defendant's Sixth Amendment right to confrontation, courts have repeatedly rejected them due to the acknowledged validity of the state interest involved and the purposes for which the laws were adopted. See e.g., People v Arenda, 330 N.W.2d 814 (Mich. 1982); People v McKenna, 585 P.2d 275 (Colo. 1978); State v Hamilton, 289 N.W.2d 470 (Minn. 1979); State v Howard, 426 A.2d 457 (N.H. 1981).

A. PROCEDURAL PREREQUISITES TO ADMISSION OF SEXUAL HISTORY EVIDENCE.

In the rare cases in which evidence of a complainant's sexual history may be relevant, rape shield laws provide a mechanism to test the admissibility of the proposed evidence. These procedures invariably include the submission of a motion to allow the use of such evidence, an offer of proof, a supporting affida-

vit, and an in camera hearing. Most states permit the hearing to be held at any time before trial (See 2 Weinstein & Berger, Evidence, ss. 412[01]-412[03], pp. 412-10-412-33). However, many others have established a notice requirement which directs the accused to inform the court and the prosecution of his intent to admit such evidence. While Michigan appears to be the only state which requires the notice to be filed "within 10 days after the arraignment on the information" [M.C.L.A. 750.520j(2); M.S.A. 28.788(10)(2)], other states and the federal government direct the notice to be filed at various times before the start of trial.[3]

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3. E.g., Ark. Code Ann., s. 16-42-101 (c)(2)(A) (3 days); Colo. Rev. Stat., s. 18-3-407(2)(a) (30 days); Ind. Code Ann., s. 35-37-4-4(c)(1) (10 days); Kan. Stat. Ann. s., 21-3525(2) (7 days); Neb. Rev. Stat., s. 28-321(1) (15 days); Ohio Rev. Code Ann., s. 2907.02(E) (3 days); Ore. Evid. Code, Rule 412(3)(a) (15 days); Wyo. Stat. Ann., s. 6-2-312(a); Fed. R. Evid. 412(c)(1) (15 days).

Nevertheless, a defendant is not precluded from offering such evidence even though there may be a failure to comply with the notice requirement. In such an event, the notice requirement may be "waived by the court" [Kan.Stat.Ann. s. 21-3525(2)]; the hearing may be held if "good cause" is shown [Ky.Rev.Stat. Ann., s. 510.145(3)(a)]; or, if "new information is discovered during the course of trial" [M.C.L.A. 750.520j(2); M.S.A. 28.788(10)(2)].

What all of these provisions have in common is (1) a motion or an offer of proof must be made which states the claim that evidence of prior sexual conduct is relevant to an issue in the case and (2) a hearing outside the presence of the jury may be held in order to determine whether such evidence, if relevant, must be admitted to protect the accused's right to confrontation (or, stated differently, that its probative value outweighs its inflammatory or prejudicial

nature since it is necessary to a crucial aspect of the defense theory of the case).

1. RELEVANCE AND NECESSITY (RELATIONSHIP OF PROPOSED EVIDENCE TO THE DEFENSE ASSERTED).

The Michigan rape shield law is quite similar to those found in other jurisdictions. It precludes opinion or reputation evidence as well as evidence of "specific instances" of the victim's sexual conduct [M.C.L.A. 750.520j(1); M.S.A. 28.788(10)(1)]. Certain evidence is admissible upon a determination that its probative value outweighs its inflammatory or prejudicial nature [M.C.L.A. 750.520j(1); M.S.A. 28.788(10)(1)]:

> "(a) Evidence of the victim's past sexual conduct with the actor.
> "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

It then sets out the procedural prerequisites which must be satisfied to

permit admission of the evidence.[4]

Once the threshold notice requirement is met, the following procedures are utilized in resolving the question of admissibility [People v Slovinski, 420 N.W.2d 145, 150 (Mich.App. 1988)]:

> "The defendant is required to offer proof as to the proposed evidence and **demonstrate its relevance to the purpose for which its admission is sought**. The offer of proof must be sufficient as to a defendant's confrontation right, as distinct from use of prior sexual history as character evidence or for impeachment. Id. [Hackett], 350, 365 N.W.2d 120.
> "If defendant's offer of proof withstands this level, the trial court continues to possess discretion to exclude the relevant evidence offered where its

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4. "(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

> probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. Id., 351, 365 N.W.2d 120. See also MRE 403. The trial court should favor exclusion of this type of evidence unless exclusion would 'unduly infringe on the defendant's constitutional right of confrontation.' Id., 351, 365 N.W.2d 120." (emphasis added)

While "seemingly" relevant evidence will often withstand the first level of examination, the inquiry is not over. To establish admissibility, the defense must then demonstrate its specific "need" for the evidence to the purpose for which its admission is sought.[5]

While an accused's claim of prior consensual sexual activity with the com-

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5. In United States v Nixon, 418 U.S. 683, 713, 94 S.Ct. 3090, 3110 (1974), this Court found that the President's generalized interest for confidentiality in the communications of his office could not overcome the right of the Watergate Special Prosecutor to obtain relevant evidence for which a preliminary and specific showing of need had been made ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.").

plainant in a rape case will usually satisfy the first level of the inquiry where the defense offered is one of consent (i.e. general relevance), the specific evidence sought to be admitted must then be examined in light of the determinative issue raised in the case in order to preserve the accused's right to confrontation (i.e. specific need).[6]

Thus, a generalized claim of prior sexual conduct between a defendant and a complainant does not end the inquiry - even where the defense asserted is one of consent to the present charge. Depending upon the evidence to be adduced at trial and the defense presented, the details of

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6. See e.g., Munn v State, 505 N.E.2d 782, 785 (Ind. 1987) [prior consensual sexual conduct with the accused is not relevant where the defense is alibi]; People v Smith, 340 N.W.2d 855, 856-857 (Mich.App. 1983) [complainant's past sexual conduct with the defendant is not admissible when the defense of consent is not raised at trial because it is not "'material to [any] fact at issue in the case', M.C.L. s. 750.520j(1); M.S.A. 28.788(10)(1)"].

the specific sexual acts performed or the simple fact that a prior sexual encounter occurred may or may not be admissible. That decision cannot, and should not, be made until a proper request is made and a full hearing is held on the issue outside the presence of the jury.

In People v. Khan, supra, it was claimed that the rape shield act violated the right to confrontation because it precluded evidence of the complainant's prior sexual activity with persons other than the defendant. 264 N.W.2d at 363. It was alleged (without elaboration) that such prior conduct may have been used to establish the probability of consent. The court rejected this contention and noted that the defendant did not suggest that the "'proof of prior sexual conduct pertains narrowly to acts evincing a pattern of voluntary encounters characterized by distinctive facts similar to the current charges'." 264 N.W.2d at 367 (emphasis in original).

Evidence of a unique pattern of sexual events during an encounter with the complainant which the defendant claimed occurred one week before the events which led to the charge of assault with intent to commit criminal sexual conduct where deemed admissible in People v Perkins, 379 N.W.2d 390, 393 (Mich. 1986):

> "If a factfinder, typically a jury, were to believe the defendant's description of the encounter the previous week, that evidence could influence its decision as to whether the events on March 6 amounted to an assault or were consensual.
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> * * *
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> "Many of the defendant's actions on March 6 (as he described them) might appear strange to a jury except in the context of his claim that a similar encounter had taken place the previous week."

In State v Hopkins, 377 N.W.2d 110 (Neb. 1985), the court formulated an evidentiary syllogism which it gleaned from the state's rape shield law when it considered the defendant's claim that evidence of the victim's prior consensual

sexual activity with the accused should have been introduced at trial:

> "Major: The victim's past sexual behavior with the defendant was consensual. Minor: The victim's behavior in the present prosecution is the **type of activity** in which the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual." (377 N.W.2d at 116) (emphasis added).

In finding that the defense failed to produce the type of evidence which tended to establish a "pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent" (377 N.W.2d at 116), the court held that

> "... in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant." (377 N.W.2d at 117).

Thus, the failure to show that prior sexual acts have a unique bearing upon

the specific nature of the theory of the consent defense precludes the admission of such evidence since it is not legally or logically relevant to the central issue in the case.[7]

Even where the proposed evidence of prior consensual sexual conduct may be admittedly material to the defense of consent, such prior conduct may be so remote in time that it is immaterial to the charged offense. Compare State v Williams, 681 P.2d 660, 664 (Kan. 1984) (alleged conduct having occurred about one and one-half years before the charged offense) with State v Stellwagen, 659 P.2d 167, 168, 170 (Kan. 1983) (defendant and complainant had not dated for seven months prior to the date of the offense).

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7. People v Williams, 330 N.W.2d 823 (Mich. 1982) [necessity of "logical relevance" between the prior sexual acts and the issue of consent); People v Zysk, 386 N.W.2d 213, 217 (Mich.App. 1986) ("prior sexual episodes which defendant sought to have admitted were distinct and unrelated to the brutal acts involved in the charged offense.")

In many cases, evidence of prior consensual sexual activity between the accused and the complainant will be relevant and admissible to the issue of consent. Nevertheless, as the foregoing authorities clearly indicate, the question of its admissibility must be closely examined before it can overcome the exclusionary provisions of the rape shield law. In the process of balancing the competing interests involved, none of the procedural prerequisites in themselves impose an undue burden upon the accused. This is obviously not only true of the offer of proof and in camera hearing requirements but it is also quite true for the notice requirement.

2. PURPOSE OF NOTICE PROVISIONS.

A requirement that the defendant disclose evidence which he intends to use at trial does not result in the relinquishment or diminution of constitutional rights. At most, it merely requires him

to accelerate his pre-trial preparation.

In Williams v Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the petitioner claimed that a state "notice-of-alibi" rule which required him to give notice of his intent to claim alibi, to furnish information as to the place where he claims to have been and to disclose the names of the alibi witnesses he intends to call deprived him of due process and a fair trial and compelled him to be a witness against himself. In dismissing these contentions, the Court made the following observation:

> "(T)he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it en-

> titles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." 399 U.S., at 85, 90 S.Ct., at 1898.

The Court also reflected upon the role of discovery in the truth-seeking process:

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. (footnote omitted) We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U.S., at 82; 90 S.Ct., at 1896.

The notice requirement found in rape shield laws is also designed to foster the same fundamental goals. A number of valid, underlying purposes are served by the notice provision.

The primary purpose of a rape shield law is to exclude irrelevant evidence of a victim's prior sexual conduct (even if

such activity may have been undertaken with the accused). The notice provision affords the victim (and the prosecution) maximum notice that such questioning may occur. 2 Weinstein & Berger, Evidence, p. 412-8.

By providing maximum notice of the intent to use such evidence, the chance that the prosecution may be surprised at trial by the revelation of such evidence is properly dispelled. Note, "If She Consented Once, She Consented Again - A Legal Fallacy in Forcible Rape Cases", 10 Val.U.L.Rev. 127, 164 (1976). See also, Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986). By avoiding undue surprise, the notice requirement also ensures that potentially prejudicial evidence will not be revealed to the jury unless its admissibility is first determined by the court outside its presence.

In People v Williams, 330 N.W.2d 823 (1982), Justice Kavanagh wrote a separate opinion explaining his reasons for

upholding the constitutionality of the notice provision in light of the claim that it violated the accused's right to confrontation:

> "The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an in camera determination that such evidence is more probative than prejudicial.
>
> "The state has a legitimate interest in encouraging victims to report criminal sexual conduct and to assist in prosecutions therefor. So long as efforts such as this statute to further this purpose do not infringe on a defendant's constitutional right to confront his accusers and produce evidence in his own behalf, they are permissible.
>
> "The procedural requirement of notice so that an in camera hearing may determine the appropriate action to serve both ends appears to us as proper and adequate.
>
> "We find no error in the trial court's ruling that the evidence proffered here was inadmissible because of the failure to observe the notice requirement." (330 N.W.2d at 832).

There is yet another consideration which supports the validity of a notice provision. As with a claim of alibi, a

notice requirement provides the prosecution sufficient time to investigate the allegation and gather additional evidence in order to confront the claim adequately at an in camera hearing.

This procedural requirement is of particular importance when an accused determines that his best course of action is to fabricate a claim that he and the complainant had previously engaged in consensual sexual activity.

In many cases, a defendant's claim that he and the complainant had engaged in prior consensual sexual conduct may be acknowledged as true by the complainant. Yet in many other cases, such a charge by the defendant may be met with a vehement denial by the victim. That such a baseless charge can easily be made and, thus, deny the victim any protection from such an accusation was noted by the court in Harris v State, 362 S.E.2d 211, 213 (Ga. 1987):

> "There is also the compelling interest of the state to

> protect its citizens from criminal acts and to encourage the victims to bring the perpetrators of the crimes to justice. 'There is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge[,]' Warren v. State, 255 Ga. 151, 156, 336 S.E.2d 221 (1985) (emphasis in original)."

If a defendant (who has failed to file a timely notice) merely has to allege that he engaged in prior sexual relations with the complainant in order to place that accusation before the trier of fact, then the purpose of the rape shield law has been eviscerated.

In reversing Respondent's conviction in the instant case, the Michigan Court of Appeals [People v Lucas, 408 N.W.2d 431, 432 (1987)] relied upon People v Williams, 289 N.W.2d 863 (Mich. App. 1980) wherein the court found that neither the notice requirement nor the in camera hearing procedure applied:

> "The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a

> defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time." 289 N.W2d at 866-867.

As the claim of prior sexual conduct between the defendant and the victim will not simply "focus on a complainant's word against the word" of the accused in every case, the court's reasoning in Williams and Lucas is indeed shallow. A victim's denial of prior sexual activity with the defendant does not immediately become a "credibility contest" which must then be

submitted to the jury for its consideration. To hold otherwise would place the victim "on trial" by requiring her to "justify her sexual past" [People v Khan, 264 N.W.2d 360, 364 (Mich.App. 1978)] thereby defeating the fundamental purpose of the rape shield law. Thus, the slight inconvenience of conducting an in camera hearing (preceded by filing a timely notice) avoids any infringement of the accused's right to confrontation and preserves the victim's right to privacy.

That a claim of prior sexual conduct between a defendant and a complainant is not necessarily a matter to which only they could testify is easily illustrated. Suppose that the defendant and the complainant meet each other at a New Year's Eve party at the home of a third person and that the defendant leaves the party alone a short time later while the complainant remains in the company of her host for the remainder of the evening. At trial, the defendant claims that he

and the complainant stayed together for the entire evening during which time they engaged in sex at the party. The prosecution should have the opportunity to produce the host or others attending the party to testify that the defendant only stayed for a few minutes and then left by himself. Alternatively, the prosecution should be provided the opportunity to produce witnesses or documentation (e.g. a visa entered upon the complainant's passport or an airline ticket) to show conclusively that the complainant did not attend the party and, if fact, was out of town or at another location at the time when the alleged sexual episode took place.

If it can be shown to the satisfaction of the trial judge at the in camera hearing that the defendant's claim is a mere fabrication and that his testimony on the matter would amount to perjury, he could properly be precluded from presenting the false allegation to the jury. As

the Court noted in Nix v Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997 (1986):

> "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely. In Harris v. New York, we assumed the right of an accused to testify 'in his own defense, or to refuse to do so' and went on to hold:
>
> > '[T]hat privilege cannot be construed to include the right to commit perjury. [citations omitted] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully....' 401 U.S., at 225, 91 S.Ct., at 645.
>
> * * *
>
> "Harris and other cases make it crystal clear that there is no right whatever - constitutional or other wise - for a defendant to use false evidence."

Seeking a judicial determination of the admissibility of evidence of alleged prior sexual relations between an accused and a complainant in an in camera hearing wherein the prosecution is afforded an opportunity to challenge the claim by showing that it is irrelevant to an issue in the case, that it is far too remote, or, that it is simply a fabrication fur-

thers the truth-seeking function of the criminal trial. It prevents unduly prejudicial or perjurious evidence from going before the jury without infringing upon the defendant's right to confrontation. In order to achieve this result, the notice requirement ensures the right of the prosecution to investigate and to rebut with evidence of its own an allegation which should not be placed before the trier of fact.

B. FAILURE TO FILE TIMELY NOTICE AND PRECLUSION OF EVIDENCE.

As previously noted, rules which require pretrial disclosure of the intent to raise certain defenses (e.g. alibi) have been held to be constitutional. Williams v Florida, 399 U.S., at 83, 90 S.Ct., at 1897. Since the issue of the constitutionality of a preclusion sanction for failure to comply with a notice-of-alibi rule was not properly before the Court in Williams v. Florida, it was not

addressed. 399 U.S., at 83, n. 14, 90 S.Ct., at 1897, n. 14.

In Wardius v Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973), the Court held that a state statute which barred the admission of alibi evidence as a sanction for the defendant's failure to comply with a notice-of-alibi rule was unconstitutional since it did not provide reciprocal discovery rights for criminal defendants. As the Court found that the rule was facially invalid, it did not express an opinion regarding the Petitioner's added claim that "... even if Oregon's notice-of-alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial." 412 U.S., at 472, n. 4, 93 S.Ct., at 2211, n. 4.

In United States v Nobles, 422 U.S. 225, 95 S.Ct. 2160 (1975), the defendant alleged that his Sixth Amendment rights to compulsory process and cross-examination were violated by the trial court's

decision to exclude the testimony of an expert witness whom he intended to call because he had refused to comply with a discovery order granting the prosecution access to a "highly relevant" report. In upholding the remedy applied by the District Court, it was noted:

> "The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment right of compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." 422 U.S., at 241, 95 S.Ct., at 2171.

Rules requiring the disclosure of

evidence which either party intends to employ at trial further the legitimate purposes of the criminal justice system by ensuring that each side will be permitted to explore and test the relevance of proposed evidence. They increase the likelihood that complete and accurate evidence is laid before the jury. Stated differently, discovery procedures which apply equally to the defense and the prosecution guard against the danger that inadmissible, misleading or fabricated evidence will infect the parties' right to a fair trial.

In Taylor v Illinois, 484 U.S. 400, 108 S.Ct. 646 (1988), the trial court barred a defense witness from testifying before the jury as a sanction for the failure to identify the witness pursuant to the prosecution's discovery motion requesting a list of defense witnesses. The trial judge based his decision upon a finding that defense counsel had committed a blatant and willful violation of

the discovery rules. Following a hearing outside the presence of the jury which included an offer of proof in the form of the witness's testimony, the judge noted a second reason to exclude the testimony; namely, that he doubted the veracity of the witness. In finding that the Sixth Amendment right to compulsory process does not create an absolute bar to the preclusion of testimony of a defense witness as a sanction for violating a discovery rule, the Court made the following pertinent observations:

> "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The 'State's interest in protecting itself against an eleventh hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts." 484 U.S., at 411-412, 108 S.Ct., at 653-654 (footnote omitted).
>
> * * *
>
> "One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for

> failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. * * * If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." 484 U.S., at 413-414, 108 S.Ct., at 655.

A important distinction between the Compulsory Process Clause and other rights protected by the Sixth Amendment was noted by the Court in Taylor:

> "There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment - its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ

> it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." 484 U.S., at 410, 108 S.Ct., at 653 (footnote omitted).

While the right to confrontation is at issue in the instant case, so too is the right to present evidence by way of defense. The duty of the defendant to take affirmative steps to secure the opportunity to present evidence of a complainant's prior sexual conduct is more akin to his burden of having to employ his own initiative to secure evidence in his own defense under the Compulsory Process Clause and should be governed by similar principles.

While lack of consent is not a issue which must be proven beyond a reasonable doubt in order to obtain a conviction for the offense of criminal sexual conduct, it is a defense to the charge which may be raised by the accused. See People v Khan, 264 N.W.2d at 366 n. 5 (Mich.App. 1978),

People v Hearn, 300 N.W.2d 396, 398 (Mich.App. 1980). Since it is a defense which must be asserted by the accused, it is similar in nature to the alibi defense. Like other affirmative defenses, a state may adopt reasonable rules of discovery and disclosure which afford the prosecution the opportunity to confront the evidence and challenge its admissibility before submission to the trier of fact.

Unlike the situation in Davis v. Alaska, where the accused could exercise no control over the court to obtain relevant evidence tending to establish bias (due to the absolute ban imposed by a state statute on the introduction of a witness's probationary status following an adjudication of juvenile delinquency), it is the defendant in a criminal sexual conduct prosecution who "controls" the introduction of relevant evidence of his prior consensual sexual relations with the complainant if he chooses to assert a

defense of consent. All that the accused is required to do is comply with the procedural requirements of the rape shield law.[8]

Just as there is no absolute bar to the preclusion of evidence as a sanction for the violation of a discovery rule under the Compulsory Process Clause, there should be no absolute bar to a similar preclusion remedy for the failure to comply with the notice requirement of the rape shield law under the Confrontation Clause of the Sixth Amendment:

> "A trial judge may certainly insist on an explanation for a party's failure to comply with

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8. Cf. Taylor v. Illinois, 484 U.S., at 415-416, 108 S.Ct., at 656 ("The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation." [footnote omitted]).

> a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony." 484 U.S., at 415, 108 S.Ct., at 655-656 (footnote omitted).

State and federal courts have upheld or approved the sanction of preclusion for the failure of the defense to comply with the various procedural prerequisites of the rape shield laws. These rules include the requirement to file a timely motion or provide the court and the prosecution with proper notice of the intent to introduce evidence of prior sexual conduct.[9] Failure to file a required

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9. People v Smith, 340 N.W.2d 855, 856 (Mich.App. 1983), State v Risdal, 404 N.W.2d 130, 132 (Iowa 1987), State v Oglivie, 310 N.W.2d 192, 195 (Iowa 1981), State v Sanders, 610 P.2d 633, 636 (Kan. 1980), State v Williams, 580 P.2d 1341, 1342-1343 (Kan. 1978), State v Larson, 389 N.W.2d 872, 876 (Minn. 1986), State v Piper, 261 N.W.2d 650, 655 (N.D.1978),

motion precludes the admission of the evidence.[10] Failure to file a required affidavit may also result in preclusion of the evidence.[11]

Since preclusion of even arguably relevant evidence for failure to comply with discovery rules does not offend the Compulsory Process Clause, preclusion of such evidence for failure to provide proper notice or to file a timely motion to admit the evidence should not be found to be violative of the Confrontation Clause.

While the remedy is severe, it would be clearly appropriate in many cases. In

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9. (con't.) State v Acre, 451 N.E.2d 802, 805 (Ohio 1983), United States v Duran, 886 F.2d 167, 168 n. 4, 169 (8th Cir. 1989), United States v Provost, 875 F.2d 172, 177 (8th Cir. 1989).

10. People v McKenna, 585 P.2d 275, 279-280 (Colo. 1978), Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986), State v Williams, 580 P.2d 1341, 1342- 1343 (Kan. 1978), State v Salkil, 659 S.W.2d 330, 334 (Mo.App. 1983).

11. State v Williams, 681 P.2d 660, 664 (Kan. 1984).

light of the fact that rape shield laws provide an accused with ample opportunity to make an offer of proof to test the relevance and admissibility of the evidence, the refusal or failure to exercise the option is his and his alone.

Lastly, the preclusion remedy has deterrent value. If it is widely understood that evidence will be barred if the procedural prerequisites are not met, a defendant would be less likely to utilize an "eleventh hour" defense which would undergo an especially severe examination by the court. In the absence of a sufficient showing of "good cause" or that the evidence was "newly discovered", the likelihood that it was recently concocted rises considerably.

III. THE INSTANT CASE.

The Respondent's conviction was reversed by the Michigan Court of Appeals based upon its conclusion that the notice requirement of the rape shield statute

[MCL 750.520j(2); MSA 28.788(10)(2)] was unconstitutional when applied to preclude evidence of the defendant's prior sexual conduct with the complainant:

> " In People v Williams, 95 Mich.App. 1, 9-11; 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." [People v. Lucas, 408 N.W.2d 431, 432 (Mich.App. 1987)].

The Petitioner's application for leave to appeal to the Michigan Supreme Court noted that the evidence admitted at trial revealed a prior intimate relationship between the Respondent and the complainant. Despite having granted leave on the question of the constitutionality of the notice requirement in People v Williams, 330 N.W.2d 823 (Mich. 1982), the application also emphasized the fact that a majority of the Michigan Supreme Court specifically stated that it was

unnecessary to resolve that issue as the evidence which was sought to be introduced was irrelevant (330 N.W.2d at 825).

After remand by the Supreme Court to the Michigan Court of Appeals for the purpose of determining whether "the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt." [433 Mich 876-877 (1989)], the Court of Appeals again reversed the Respondent's conviction and stated as follows [Opinion of the Michigan Court of Appeals (On Remand), Petition for Certiorari, pp. 11a-12a]:

> "As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in which they saw each other practically every day. Their relationship experienced difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972)."

A. REQUIRING NOTICE.

On the day of trial (seven months after the Respondent's arraignment on the information), defense counsel made an oral motion to admit evidence of the prior sexual relations between the defendant and complainant. Every procedural rule governing the admission of such evidence was broken - a fact pointed out by the circuit court judge (R. 6) and readily admitted by defense counsel (R. 3-5).

The only reason for failing to file a proper and timely motion which counsel offered the court was that she "was not aware that (she) could have made it be-

cause Mr. Lucas had a different attorney. In fact, (she) was appointed to this case one week prior to trial initially when he had his first attorney." (R. 5).

The circuit court record contains an appearance filed by Respondent's retained on October 25, 1984 (J. A. 2). As late as November 14, 1984, his retained attorney filed a motion to adjourn the trial in order to conduct a polygraph examination (J. A. 2). An order bearing the signature of the retained attorney is contained in the court file.

The court file also notes an entry on a "Case Inquiry" form for January 31, 1985 (J. A. 2)] assigning the matter for trial and indicating the name of the Respondent's newly-appointed attorney, Gayle Fort Williams. An appearance filed by Ms. Williams on February 8, 1985 as well as an order granting an adjournment of the trial (for the reason that counsel had just been appointed) is also contained in the circuit court file (J. A. 2).

In order to have complied with the notice provisions of [MCL 750.520j(2); MSA 28.788(10)(2)] ("10 days after the arraignment on the information"), the notice would have to have been filed by November 4, 1984.

If the Respondent's original attorney was still the attorney-of-record on November 4, 1984, it would have been his responsibility to file the notice. The court records indicate that he was and, since he was the attorney who conducted an extensive cross-examination of the complainant as well as a thorough examination of his client at the September 18, 1984 preliminary examination at which the fact of their prior sexual relationship was made a matter of record it cannot be said that he was unaware of it or that it may have been relevant to the claim of consent. Nor can it be assumed that he was ignorant of the statutory requirements.

If Respondent's appointed counsel

had not entered the case until sometime after the November 4, 1984 cut-off date, no explanation was ever offered to excuse the failure to file a motion and seek an in camera hearing at any time prior to the trial date.

In view of the pre-trial posture of the case, there could be no claim that the evidence was "newly discovered" (the only exception set forth in the statute for the failure to file a timely notice).

In view of the blatant and wholly inexplicable failure to comply with the statute (or even to seek a delayed hearing on the matter), it cannot be said that the court's refusal to "allow evidence, testimony of their prior sexual intercourse" (R. 3-4) was an abuse of discretion.

Simply because the type of sexual conduct which the defendant and complainant had engaged in on previous occasions during their relationship was brought out at the preliminary examination, it cannot

be said that this fact alone dispensed with the notice requirement or any of the other procedural rules for admission of the evidence or that the prosecution thereby waived its right to enforce those rules at trial.

As noted by the trial prosecutor (an assistant prosecutor other than the one who conducted the preliminary examination), the rights "referred to in our Rape Shield Statute are rights that belong to the complaining witnesses in these criminal sexual conduct cases. They are not rights to be taken lightly and even waived by prosecutors in trials like this." (R. 5). As these rights are intended to be personal to the victim, the fact that the details of her prior sexual activities came to light during a pre-trial hearing simply does not imply that the defendant has secured a right to present such evidence at every subsequent hearing.

Nor can it be assumed that the de-

fense will attempt to admit such evidence at the trial itself. In preparing for trial, defense counsel will necessarily weigh the strengths and weaknesses of his or her case and that of the prosecution. As part of this process, a determination will be made regarding which pieces of evidence will be needed to present a viable defense to the charge. If it is necessary to elicit the details of specific acts of prior sexual intercourse [e.g., "patterns of behavior" [People v Perkins, 379 N.W.2d 390, 391 (Mich. 1986)], he may notify the court and move for its admission. If such evidence is deemed to be unnecessary, counsel may make a conscious decision to avoid it at trial - even though it may have been brought forth at a previous hearing. In short, unless the defense files a timely notice and moves for its admission as required by the rape shield law, the prosecution cannot be presumed to know that the defendant will attempt to uti-

lize the same evidence which may have been presented at an earlier hearing.

The right to confrontation does not entitle a defendant to expose a victim's sexual past at every turn in the criminal justice process without prior notice. This is especially true where it is not relevant to the defense asserted.

B. TESTING RELEVANCE.

The notice requirement is but the first hurdle which the accused must overcome in his quest to secure admission of evidence of his prior sexual relations with the complaining witness. An offer of proof must be made which establishes, to the satisfaction of the trial court, that the evidence specifically relates to a critical element of the defense raised. This is true even where the defense is consent and the evidence concerns prior sexual activity between the accused and the victim.

In the instant case, defense counsel

merely moved to admit "testimony concerning prior sexual intercourse between the defendant and the complainant." (R. 3). Counsel did not indicate whether she wanted to introduce the simple fact that a previous sexual relationship existed or whether she intended to elicit testimony regarding specific instances of sexual activity or the details of prior sexual encounters. She also made no attempt to explain how such evidence would be relevant to the Respondent's defense to the charges against him. In short, defense counsel failed to make a sufficient offer of proof. Aside from the failure to comply with the notice requirement, the lack of an adequate offer of proof is also a basis for preclusion.[12]

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12. E.g., People v McKenna, 585 P.2d 275, 279-280 (Colo. 1978) ("[Defendant] never indicated, by offer of proof or otherwise, what past sexual conduct by the victim he hoped to prove, or how her sexual history might be relevant to his defense."); Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986) ("[E]ven assuming that compliance with the statu-

In the instant case, the court of appeals not only adopted an earlier decision which held that the notice provision was unconstitutional but also found that the in camera hearing procedure to test the relevance of the evidence was an unnecessary requirement. It did so by relying upon the following language found in People v Williams, 289 N.W.2d 863, 866-867 (Mich.App. 1980):

> "... (T)he very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant is personal between the parties. As such,

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12. (con't.) tory procedure could be excused in this case, the trial judge concluded that the defendant had not provided a sufficiently relevant factual basis to permit the victim's credibility to be attacked by introducing evidence of previous sexual conduct."); State v Hopkins, 377 N.W.2d 110, 117 (Neb. 1985) ("[I]n order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant.")

> it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time." [People v Lucas, 408 N.W.2d 431, 431 (Mich. App. 1987).

To be sure, credibility is the key factor for the jury or judge to determine in the trial of a criminal matter. However, for evidence to be admissible (and, therefore, be properly placed before the fact-finder), relevance must first be established. By relying upon the above-cited statement in Williams, the court completely ignored or overlooked the primary and indispensable purpose which is served by the in camera hearing procedure; namely, to determine whether even "arguably" relevant evidence may be excluded when it is shown to be more prejudicial than probative and legally irrelevant to the defense asserted.

Even if the Respondent had complied with this second procedural requirement by filing "a written motion and offer of proof" [pursuant to MCL 750.520j(2); MSA 28.788(10)(2)], he would have then have had to demonstrate legal relevance. As aptly noted by the court in State v Daniels, 512 A.2d 936, 938 (Conn.App. 1986):

> "If the proffered testimony is not relevant to a material issue in the case, the defendant's right to confront his accuser is not affected."

C. SHOWING PREJUDICE OR LACK OF "HARMLESS ERROR".

In lieu of granting the Petitioner's application for leave to appeal following the initial reversal of the Respondent's conviction, the Michigan Supreme Court remanded the case to the court of appeals for a determination of whether the preclusion of the evidence was nonetheless "harmless beyond a reasonable doubt" [433 Mich 876-877 (1989)].

The court of appeals again reversed.

It found that "(v)irtually all of the evidence in this case consisted of complainant's word against the word of defendant". As such, the court could not find that preclusion of "prior instances of sexual relations" was harmless beyond a reasonable doubt because "the question of credibility was central to this case." [Opinion of the Michigan Court of Appeals (On Remand), Petition for Certiorari, pp. 11a-12a].

Petitioner respectfully contends that the court of appeals did not look far enough.

While maintaining that the circuit court properly excluded the evidence on procedural grounds, Petitioner asserts that the Respondent was not denied his right to effective cross-examination so as to violate his right of confrontation. Respondent has not, and simply cannot, show that his defense was in any way prejudiced by the exclusion of the evidence.

In this respect, the Petitioner's

claim is more accurately one of "lack of prejudice" (there being no error in the exclusion of the evidence) rather than one of "harmless error".

In People v LaLone, 437 N.W.2d 611 (Mich. 1989), the court held that the exclusion of evidence of the victim's sexual history did not violate either the rape shield statute or the defendant's Sixth Amendment right to confrontation. Writing for a majority of the court on this issue, Justice Archer noted that evidence other than the complainant's sexual history was presented from which her bias could be inferred. As such, its exclusion was "not constitutional error violative of the defendant's Sixth Amendment rights." (437 N.W.2d at 621). After citing Delaware v Van Arsdall for the proposition that the right to confrontation ensures the "opportunity for effective cross-examination" (437 N.W.2d at 621), Justice Archer added:

> "Unlike the defendant in Davis [v. Alaska, 415 U.S. 308, 94

> S.Ct. 1105 (1974)], the trial court's exclusion of the complainant's sexual history left the defendant with several avenues to explore the complainant's bias or motive to fabricate." (437 N.W.2d at 621).

In State v Hamilton, 289 N.W.2d 470 (Minn. 1979), the defendant claimed that he was denied his right to confrontation by the trial court's refusal to permit him to question the complainant regarding her previous sexual conduct. The court rejected this contention by noting that defense counsel conducted an extensive cross-examination concerning the events charged in the complaint, that the defendant had ample opportunity to present his defense "and, through his witnesses, to raise the issue of the complainant's prior sexual conduct as it relate[d] to the issue of consent"; and, that the prosecution did not deny the complainant's prior sexual activity but only questioned its relevance. (289 N.W.2d at 476). See also State v Larson, 389 N.W.2d 872 (Minn. 1986). Faced with a

similar claim of constitutional error, the court in People v Smith, 340 N.W.2d 855 (Mich.App. 1983) noted as follows:

> "There is one final reason why the trial court's refusal to allow the proposed cross-examination could not have been reversible error; **defendant was not prejudiced by the refusal because evidence of his prior sexual activity with the complainant was in fact admitted later at trial. The court permitted defendant to testify during his own direct examination that he had had some sexual encounters with the complainant.**" 340 N.W.2d at 857 (emphasis added).

In the instant case, the Respondent was also afforded every opportunity to explore his past sexual relationship with the complainant. The record of the trial proceedings reveals quite unequivocally that evidence of this relationship was submitted to the fact-finder.

The Respondent waived his right to a jury trial, electing instead to be tried by the court (R. 6-8). Immediately prior to the jury waiver, defense counsel requested the court to grant an untimely

motion to allow testimony regarding the complainant's prior sexual relationship with the Respondent (R. 3-6). While the circuit judge denied the request, the motion in and of itself brought to the attention of the trier-of-fact the information that there had been a sexual relationship between the Respondent and the complainant.

The complainant, the Respondent, and the complainant's mother testified that there had been a "boyfriend-girlfriend" relationship (R. 10-13, 125, 164-166).

Through the Respondent's testimony, it was shown that the complainant was familial with the upstairs portion of his home, including the bedroom (R. 168-169). He testified that the complainant had told him at some point before the events of August 31, 1984 that she was pregnant with his child. He testified that the reason he hit her on the day in question was because she told him that the child was not his (R. 205-210). An even more

explicit indication to the trier-of-fact that a prior sexual relationship had existed came from the Respondent's statement that he believed that he had contracted gonorrhea from the complainant (R. 182, 190-191).

It is, therefore, apparent that in spite of the circuit court's denial of the Respondent's belated motion, it was well within the knowledge of the trier-of-fact that he and the complainant had been involved in a prior consensual sexual relationship. Armed with this knowledge, the circuit judge then weighed the credibility of the witnesses and found the Respondent guilty.

It cannot be said that the trier-of-fact was deprived of any relevant evidence due to the denial of the motion. Nor can it be said that the Respondent was in any way prevented from conducting an effective cross-examination. Indeed, the Respondent never indicated in what manner any of the specific details of his

prior sexual encounters with the complainant would have been relevant to his theory of the case.

If there was no prejudice to the Respondent, there was no error. If there was error, the facts of this case clearly indicate that it was harmless beyond a reasonable doubt.

RELIEF

WHEREFORE, Petitioner requests this Honorable Court to reverse the Michigan Court of Appeals.

Respectfully submitted,

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Dated: December 28, 1990

TAB/DWA/mlw

No. 90-189

In The

Supreme Court of the United States

October Term, 1990

MICHIGAN,

Petitioner,

v.

NOLAN K. LUCAS,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF THE QUESTION PRESENTED

WHETHER MR. LUCAS WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES, WHERE HE WAS PRECLUDED FROM PRESENTING EVIDENCE OF A LONG TERM SEXUAL RELATIONSHIP WITH THE COMPLAINANT BECAUSE HIS ATTORNEY FAILED TO COMPLY WITH THE NOTICE PROVISIONS CONTAINED IN THE RAPE SHIELD LAW.

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COUNTER STATEMENT OF THE CASE

On September 5, 1984, a warrant authorizing the arrest of defendant was issued, charging him with two counts of first degree criminal sexual conduct, count one being fellatio and count two being sexual intercourse with the use of force, contrary to MCL 750.520(B)(1); MSA 28.788(2)(1).

A bench trial was conducted before a Wayne County Circuit Judge and on May 15, 1985, Nolan Lucas was found guilty of "criminal sexual conduct in the third degree, on both counts". (R. 262, 266) On July 2, 1985, Mr. Lucas was sentenced to the Michigan Department of Corrections for confinement between 44 to 180 months. (R. 285)

HISTORY OF PARTIES' RELATIONSHIP

Wanda Brown, the complainant, and Nolan K. Lucas initially met in late March or early April, 1984. (R. Prem. Exam. 21) By August 31, 1984, the date of the alleged rape, Ms. Brown described the relationship between her and Mr. Lucas as being "boyfriend and girlfriend", and that they had been "dating one another for six or seven months". (R. Prem. Exam. 4) Both lived on Rhode Island Street in the City of Highland Park, Michigan, only a couple of blocks from one another. (R. Prem. Exam. 4) Ms. Brown visited Mr. Lucas in his house four or five times per week during the course of the relationship and saw each other nearly every day. (R. 62) In fact, during the course of their relationship, Ms. Brown visited Mr. Lucas' home over 100 times. (R. Prem. Exam. 23)

At the preliminary examination, Ms. Brown testified that she and Mr. Lucas had sex over one hundred (100) times. (R. Prem. Exam. 23)[1]

Ms. Brown further testified that at different times in the relationship, she had both "conventional, straight penil-vaginal sex, as well as oral sex". (R. Prem. Exam. 23) Defense counsel further inquired as to the sexual relationship of the parties as follows:

> Q. And when we say oral sex at different times, would that involve you performing fellatio on him and him performing cunnilingus on you or what?
>
> A. Yes.
>
> Q. Such experiences, you would indicate you probably had with my client, how many times?
>
> A. I don't know.
>
> Q. More than you can remember.
>
> A. No.
>
> Q. Okay, how many times?

---

[1] The Michigan Rape Shield Act, MCL 750.520(j); MSA 28.788(10) as most rape shield laws, prohibit the use of a victim's prior sexual experiences, except for certain limited conditions. However, the Michigan statute does not specifically indicate whether it applies to preliminary examinations. In fact, it could be strongly argued that it applies only at the time of trial for the reason that any effort to introduce said evidence must be done, according to the statute, within ten days of the arraignment on the information (which is well after the preliminary examination) or if newly discovered during the trial, an *in camera* hearing may be held to determine admissibility. Since there was no objection to the cross-examination as to the complainant's prior sexual relationship with the defendant, the district court judge permitted defense counsel to engage in extensive cross-examination of the prior sexual relationship between the parties, and further permitted the defendant, at this hearing, to specifically testify as to the parties' prior sexual relationship.

> A. I don't know, over a hundred times I guess. It was a lot of times. (R. Prem. Exam. 23)

According to Ms. Brown, the parties had a serious relationship and talked about marrying one another. (R. Prem. Exam. 24) Moreover, at the preliminary examination, Mr. Lucas also confirmed the parties' long term sexual relationship.[2]

On direct examination of Mr. Lucas, defense counsel continued as follows:

> Q. I see, okay. Now, you have heard the testimony of the complaining witness, who suggested that such sex – strike that, did you have sexual intercourse with Wanda Brown on the evening of August 31, 1984?
>
> A. Yes, I did.
>
> Q. Did you have it with her based on mutual consent, freely and voluntarily or did you force her to have sex with you?
>
> A. No, sir. It was the same way it had been just about every night before then, freely.
>
> Q. How many times would you say, that you had sexual interaction with Wanda Brown?
>
> A. Since we've met?
>
> Q. Yep.
>
> A. Approximately, every other day, since we've known each other, as a matter of fact, the

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[2] Defense counsel took the very unusual step to put Mr. Lucas on the stand at the preliminary examination. In Michigan, this is rare, for this is in effect only a "probable cause hearing" and if there is any factual dispute, whatsoever, the matter is normally bound over to the higher court. However, by placing Mr. Lucas on the stand at that time, which was the earliest stage in the proceeding, the prosecution was provided with the defense strategy and specific notice of defendant's defense in this matter, that being consent.

first day we met each other, we had sex that night by my fireplace.

* * *

Q. Have you ever had to coerce Wanda Brown into having sex with you?

A. If I maybe (sic) so bold, sir, most of the time, it was her that was doing the coercing. (R. Prem. Exam. 62, 63)

The parties continued in this serious sexual relationship until about two weeks before the incident, which was on August 31, 1984. (R. 11) Ms. Brown indicated that she was fond of Mr. Lucas, that she liked him and cared for him. (R. 66) Although Ms. Brown indicated that two weeks prior to the incident, the parties became "estranged", they nevertheless continued to speak. (R. 66) During this period of estrangement, Ms. Brown continued to visit Mr. Lucas, on his invitation. (R. Prem. Exam. 43) In addition, Mr. Lucas testified that at one point, they were very close and that he intended to marry Wanda Brown. (R. 164, 166, 216) In fact, Mr. Lucas testified that he asked Ms. Brown's mother for permission to marry her. (R. 167)

THE INCIDENT AND TRIAL

The trial in this matter commenced on May 14, 1985.[3] (R. 3) Prior to the commencement of trial. Gail Williams,

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[3] The chronology of events leading to trial is relevant. The notice provision of the Michigan Rape Shield law is triggered "within ten days of the arraignment on the information". MCL 750.520(j)(2); MSA 28.788(10)(2) According to the "case inquiry", a computer generated document indicating every single transaction and corresponding date, item no. 5 indicates that on September 14, 1984, the defendant retained his own

(Continued on following page)

defendant's newly appointed attorney, asked that she be permitted to present testimony concerning the prior sexual intercourse between Mr. Lucas and Ms. Brown, the complainant. (R. 3) Defense counsel made two points in support of her motion. First, she indicated that she was appointed as counsel for the defendant past the time that the motion could have been made.[4] (R. 3) Her second

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counsel, Kenneth V. Cockrel. Item No. 8 indicates that on September 18, 1984, the preliminary examination was conducted and the defendant was bound over for trial as charged. Items 14 and 15 are curious in that they indicate that on October 25, 1984, the arraignment on the information occurred and the defendant pled not guilty (Item 15). However, Item 14 indicates that on October 25, 1984, there was a substitution of attorney filed or indicated on the record by defendant's retained counsel, Kenneth Cockrel. This is relevant for the reason that the retained counsel stated that he was no longer going to be representing defendant after the arraignment on the information. However, on November 8, 1984 (Item 16), it was noted that there was a substitution of attorney by Kenneth Cockrel. Item 24 indicates that on January 21, 1985, the matter was assigned for trial with the attorney being Gail Williams. However, a substitution of attorney (Item 21) was not formally entered until February 8, 1985 by Ms. Williams. The significance of these dates is that there was a serious question as to whether the defendant in this matter was actually represented by counsel during the critical notice time period. It is clear that the state did not appoint new counsel until well after the ten day period had elapsed. What is not entirely clear is when Mr. Cockrel substituted out of the case. At least from this case inquiry, which is part of the record, the court computer indicates that the substitution occurred as early as October 25, 1985, the date of the arraignment on the information.

[4] On this point, defense counsel is technically correct since the rape shield statute, MCL 750.520(j); MSA 28.788(10) only

(Continued on following page)

point was that the defense of defendant was based upon the relationship (including sexual relationship) he had with the complainant over a very long period of time. (R. 3)

The trial prosecutor objected saying that the statute prohibited the bringing of the motion at the time of trial and referred to the statute which requires the motion to be filed within ten days of the arraignment on the information. (R. 4) In response to defense counsel's motion, the court stated:

> None of the requirements set forth in (MCL) 750.520(j), subsection 2, have been complied with; and among others, other than filing ten days after the arraignment on the information, that is, the court should have an *in camera* hearing on the evidence which has not been done. Unless this information is filed or discovered during the course of trial, I would have no right to go into that, but your motion is respectfully denied. (R. 6)

After being denied the motion, defendant thereafter waived his right to a jury trial and decided to proceed with a bench trial only. (R. 7-8)

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allows two time periods in which to seek to raise this issue. First, the defendant must bring the motion "within ten days after the arraignment on the information", and second, if new information is discovered *during the course of the trial*, the court may conduct a separate hearing to determine admissibility. Defense counsel having known about the defense prior to trial, but after the expiration of the ten days, could not have technically made this motion. If defense counsel had made the motion, then the prosecutor would have opposed it for the reason that it was not timely as prescribed by the statute. On the other hand, if the prosecutor did not oppose it as being untimely, then the prosecutor would be conceding that the notice requirement as prescribed by the statute can be flexible.

Wanda Brown testified that on August 31, 1984 at approximately 9:45 p.m., she received a telephone call from Mr. Lucas wherein he indicated that he wanted her to come to his home to watch cable television. (R. Prem. Exam. 5) She further testified that "I didn't accept at that point, I told him that I needed cigarettes and that if he could wait until I got back from the gas station, that I would come down." (R. Prem. Exam. 19) About five or ten minutes later, she left her home and began walking toward a Marathon gas station for the purpose of purchasing the cigarettes. (R. 20) As she was walking by or near Mr. Lucas' home, he called her from his porch. (R. Prem. Exam. 24) She was across the street from his house, and at that point, she proceeded to cross the street to meet him. (R. Prem. Exam. 24) She then stated to Mr. Lucas, "[a]re you going to walk with me," assuming that he was going to accompany her to the gas station to get the cigarettes. (R. Prem. Exam. 24, 25) He indicated that he did not want to walk with her to the gas station and she stated, "Well, he was my boyfriend – I just wanted him to walk to the gas station with me, whether he wanted to or not made me no difference." (R. Prem. Exam. 25)

At that point, Ms. Brown then testified that Mr. Lucas grabbed her arm, showed her a knife and told her that she was coming with him to his house. (R. 15)

Once into the house, he made her disrobe in the dining room. (R. 17) At that point, Ms. Brown testified that Mr. Lucas appeared angry because she was apparently seeing someone else. (R. 18, 19) He had taken the contents of her purse and dumped it on the table, apparently looking for information regarding another boyfriend. (R. 19)

Thereafter, according to Ms. Brown, the defendant had her go into the living room and sit on the couch, still unclothed. (R. 19) She then testified that the defendant left the room and got a bottle of wine and poured it into two glasses, still trying to inquire about her other lover, purportedly named "Ricky". (R. 19)

Thereafter, with a knife displayed, Ms. Brown testified that she was forced to perform both oral and vaginal sex. (R. 17, 19, 30, 32) Ms. Brown further testified that she was required to stay in the house for an approximate 24 hour period. (R. 39)

During this 24 hours period, Mr. Lucas left Ms. Brown alone at least three times when he went to the cellar for more wine. (R. 76) Additionally, Mr. Lucas, according to the testimony of Ms. Brown "went upstairs" more than five times. (R. Prem. Exam. 31)[5] Thereafter, Mr. Lucas and Ms. Brown went to sleep on a sofa couch (R. Prem. Exam. 36) and awoke the following morning at approximately 10:00 a.m. (R. Prem. Exam. 37)

During the course of the 24 hour period, Ms. Brown testified that she was struck by Mr. Lucas in her right eye. (R. 29) Although Ms. Brown testified at the preliminary

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[5] Ms. Brown's credibility was a significant issue in this case. For instance, she testified at the preliminary examination that Mr. Lucas went upstairs more than five times (R. Prem. Exam. 31) but at trial, she indicated that he only went upstairs once. (R. 78) More significantly, at trial, Ms. Brown testified that she could never remember how many times Mr. Lucas hit her (R. 184), but then she recalled he hit more than a few times. (R. 105) However, at the preliminary examination, she testified that he hit her 50 to 100 times. (R. Prem. Exam. 31) This is relevant to the extent that if the prior sexual relationship evidence had been available to the fact finder, defendant's trial counsel could have been able to tie these inconsistencies into a common theme.

examination that she was struck between 50 and 100 times, (R. Prem. Exam. 31) she did not visit her doctor until four days later. (R. Prem. Exam. 32) Ms. Brown saw a doctor because the officer in charge of the case advised her to do so. (R. 148)

Ms. Brown testified that throughout this 24 hour period, Mr. Lucas had made his pocket knife visible. (R. 32, 33) Further, Mr. Lucas was very angry about a person named "Ricky", whom defendant suspected of being Ms. Brown's new lover. (R. 18, 19, 34)

Mr. Lucas testified on his own behalf. He confirmed that the parties had a very close relationship. (R. 164) He further testified that he had considered marrying Ms. Brown. (R. 166) Mr. Lucas admitted to having seen Ms. Brown on August 31, 1984. (R. 168) He testified that on the night in question, he called Ms. Brown on the telephone and asked that she come to his home and she replied that she would be ready to come down shortly, but needed to get cigarettes first. (R. 200, 201) Mr. Lucas testified that a few minutes later, she picked him up in her mother's automobile and they went to the gas station where they always obtained cigarettes or other supplies. (R. 201)

Thereafter, Ms. Brown dropped Mr. Lucas back home, took her mother's car home and shortly thereafter, walked back to his house. (R. 202)

He then testified that they sat in the living room where the television was and began drinking Michelob beer. (R. 202) He indicated that they both drank a large amount of alcohol since he had recently purchased two six packs of beer and some wine. (R. 202) At approximately 11:00 p.m. he had ordered a pizza to be delivered at the house and he had also prepared other food. (R. 204)

He indicated that early the following morning on September 1, they had voluntary sexual intercourse. (R. 205) He testified that in fact in the early morning hours, the couple had voluntary and mutually consensual intercourse four times. (R. 168)

Mr. Lucas' defense to this charge was consent. (R. 168) However, Mr. Lucas did acknowledge to striking Ms. Brown. (R. 205) He testified that the reason that he struck Ms. Brown was that in the act of making love, she called out another person's name, that person being Ricky. (R. 205) She also told him that she was pregnant by another man which also angered him. (R. 206)

After they had eaten and "after the sex was over, and after the slapping, we ended up going to sleep." (R. 206) He testified that after they awoke the following morning, they discussed the fact that they would not be seeing each other anymore because problems had arisen over the fact that she was seeing other men and had advised him that she was pregnant. (R. 208)

Mr. Lucas testified that Ms. Brown was worried about her "face" because it apparently had become swollen or was otherwise bruised. (R. 209) They agreed to tell her mother that she had been mugged or robbed and that she had stayed over at Mr. Lucas' home to recuperate. (R. 209) Thereafter, Mr. Lucas walked Ms. Brown home. (R. 210, 212)

Other witnesses testified as well. Dr. Michael Sampson testified that he performed a pelvic examination upon the complainant, Ms. Brown, and that examination did not reveal any lacerations or bruises. (R. 92) Dr. Sampson further indicated that there was nothing regarding his examination that would either prove or disprove that the sexual assault had occurred. (R. 93) Dr. Sampson

did indicate that Ms. Brown had some bruising around her right eye, and abrasions in the right neck area. (R. 91)

Karen Barden, a detective with the Highland Park Police Department, also testified at the trial. She stated that she arrested Mr. Lucas on September 5, 1984. (R. 140) She further testified that she obtained a knife from him and that he had given her a statement. (R. 141) Defendant's statement was in substance consistent with his testimony, both at the preliminary examination and at the trial. (R. 145) Officer Barden did acknowledge that it was at her suggestion that Ms. Brown see a physician. (R. 148)

In addition, Ms. Mary Simmons, the complainant's mother testified. However, she had no direct or first hand information regarding this incident. (R. 116-131)

At the conclusion of the testimony and after final arguments, the court found that there had been sufficient evidence to establish beyond a reasonable doubt that the defendant, Mr. Lucas, was guilty of criminal sexual conduct in the third degree. (R. 262) The difference between first degree and third degree criminal sexual conduct involves the use of a weapon, and in this matter the court found that there was not sufficient evidence to establish that a weapon had been used in connection with the act. (R. 262, 263) The court indicated that it recognized that there were inconsistencies in the testimony from the complainant, however, they were not of sufficient nature to impeach the main part of her testimony. (R. 264) Since there was no evidence of the prior long term sexual relationship of Mr. Lucas and Ms. Brown, the court did not consider that in its rejection of the defense of consent. (R. 265)

Even at the time of sentencing, the court had some reservations. The court stated:

> I hope I am not wrong, but if I am wrong, I regret it; but I think I am right and I wish that

> he would reconsider, if he could, the action taken as the court viewed it against his girl-friend or lady friend or woman friend and what she contends happened. (R. 285)

Thereafter, the court sentenced Mr. Lucas to the Michigan Department of Corrections for confinement from 44 to 180 months. (R. 285)

SUMMARY OF ARGUMENT

The Michigan Rape Shield Law requires that the defendant, through his attorney, file a motion with an offer of proof within ten (10) days of the arraignment on the information, if the defendant wishes to cross-examine the victim or present evidence to the fact finder of the prior sexual relations of the parties. In this case, a timely motion was not filed due to the negligence or inadvertence of defendant's attorney. A motion was made at the time of trial but was denied by the court because the court stated that the Rape Shield Statute precluded such a late request. It is a defendant's position that the trial court committed reversible error in imposing the preclusion sanction and not allowing him to testify in his own behalf and cross-examine the essential prosecution witness.

The Sixth and the Fourteenth Amendments guarantee a defendant the right to confront and cross-examine witnesses and the right to testify in his own behalf and present a defense. As applied in this fact situation, the Michigan Rape Shield Law deprived Defendant Lucas of these fundamental rights. While states may have procedural and statutory limitations on the scope of cross-examination and on the extent of testimony that can be presented, those rules cannot be construed so as to deprive a defendant of his fundamental rights. In such a

case, absent a showing of a compelling reason, state procedural rules must give way to the defendant's constitutional rights. In this instance, there was not a sufficient compelling reason to justify Defendant Lucas' denial of his fundamental rights.

Even where notice provisions in criminal discovery have been held to be constitutional, imposition of the preclusion sanctions have only been upheld where the actions of the defendant were deliberate or intentional in circumventing the prosecutor's case. The most that could be claimed in this case was that defendant's counsel was negligent and in such case, the defendant should not be denied his access to a fair trial for the negligent acts of his attorney.

Moreover, the trial court abused its discretion, or in fact, failed to exercise its discretion, when it imposed the preclusion sanction as to the proposed testimony instead of adjourning the trial or merely conducting an immediate *in camera* hearing. Since there were only two pertinent witnesses, the defendant and the complaining witness, both being present, there was no valid reason why a hearing on admissibility could not be held.

One of the purposes of the rape shield law is to provide notice to the prosecutor and complaining witness of the intention to probe the prior relationship. Certainly the state could not claim surprise in this case since the prior relationship of the parties had been probed in detail at the preliminary examination. In addition, since the lengthy relationship of the complainant and defendant was examined, without objection, it is unlikely that additional embarrassment would have resulted, and in any case such a claim was effectively waived.

Finally, the preclusion sanction should never bar a defendant from testifying in his own behalf. Yet, that was the effective result in this case. The precluded testimony

and cross-examination pertained to crucial facts of the case and deprived the defendant of presenting a defense. The Michigan Court of Appeals correctly concluded that this was not harmless error beyond a reasonable doubt and its ruling should be affirmed.

ARGUMENT

MR. LUCAS' RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES WERE VIOLATED WHEN RELEVANT TESTIMONY WAS EXCLUDED DUE TO A PRECLUSION SANCTION FOR THE FAILURE TO ADHERE TO THE STRICT NOTICE PROVISIONS OF THE MICHIGAN RAPE SHIELD STATUTE.

I. STATE PROCEDURAL AND STATUTORY LIMITS ON THE PRESENTATION OF EVIDENCE MUST YIELD TO THE SIXTH AMENDMENT GUARANTEE TO PRESENT A DEFENSE AND TO CROSS-EXAMINE THE WITNESS

A. A Defendant Has A Fundamental Right Under The Sixth Amendment To Present A Defense And Cross-Examine Witnesses

The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and the Michigan Constitution.[6]

[6] The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . The Michigan constitution provides in pertinent part, [I]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor . . . *Const.* Art. 1, §20

These rights are incorporated in the Fourteenth Amendment and are therefore available in state proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965); *Washington v. Texas*, 388 U.S. 14 (1966). The rights guaranteed by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973). These two rights have been appropriately described as the opposite sides of the same coin, and together, they grant a defendant the constitutional right to present evidence.[7]

The confrontation clause grants a defendant the right to effective cross-examination of witnesses whose testimony is adverse. *Davis v. Alaska*, 415 U.S. 318 (1973). The compulsory process clause grants the defendant the right to admit favorable testimony in his behalf. *Chambers v. Mississippi, supra*, 295. In *Chambers*, the Court analyzed the main purpose of the Sixth Amendment, particularly as it applied to cross-examination:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process". *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Bruton v. U.S.*, 391 U.S. 123, 135-137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). Of course, the right to confront and cross-examination is not absolute and may, in appropriate cases, bow to accommodate other legitimate

[7] Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 609 (1978)

> interests in the criminal trial process, e.g. *Mancusi v. Stubbs*, 408 U.S. 204 (1972). **But its denial or significant diminuition calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.** *Berger v. California*, 393 U.S. 314, 315 (1969) (Emphasis added)

Chambers v. Mississippi, supra at 295.

Over the years, this Court has consistently reviewed cases where state procedural or statutory rules impinge upon a defendant's rights under the Sixth Amendment. In *Chambers*, the defendant was prevented by a state evidentiary rule, known as the voucher rule, from presenting certain witnesses who could have testified that another person admitted or confessed to the crime which defendant was charged. Also, the defendant was prohibited from calling as a witness the other person who had in fact confessed to the crime. The Court in *Chambers* concluded that the testimony was critical to Chambers' defense and that in those circumstances, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be implied mechanistically to defeat the ends of justice." *Id.* 302.

In invalidating the hearsay rule as applied in *Chambers*, the Court recognized that there was an important state interest at stake. The Court noted that as a general rule, rules of evidence pertaining to the exclusion of hearsay evidence are respected and frequently applied in jury trials. *Id.* 302. However, such interests must give way when they are inconsistent with a defendant's fundamental rights guaranteed by the Sixth Amendment.

In *Davis v. Alaska, supra*, the defendant was prohibited from cross-examining a prosecution witness. The State of Alaska had a statute which prohibited the raising of a juvenile's record in court, even for the purposes of

cross-examination and impeachment. Defendant attempted to get this information before the fact finder since it would have been important to show bias and prejudice. There, the juvenile witness may have had a motivation to divert police attention away from himself, since the witness was on probation, and it was defendant's theory that he implicated defendant, to avoid being the prime suspect.

The purpose behind the Alaska statute was to protect the good character and reputation of a juvenile and to avoid embarrassment. However, the Court in *Davis* found that a witness' credibility is affected by means of cross-examination directed toward revealing possible biases, prejudice or ulterior motives of the witness as it relates to the issues of personalities in the particular case. *Id.* 316.

The Court noted that the state's aim in protecting the anonymity of juvenile offenders was admirable and important, but it concluded,

> We conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. **Whatever temporary embarrassment might result to Green (the juvenile) or his family by disclosure of his juvenile record – if the prosecution insisted on using him to make its case – is outweighed by the petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness . . .**
> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the state cannot, consistent with the right of confrontation, require the petitioner to bear the full

> burden of vindicating the State's interest in the secrecy of juvenile criminal records. (Emphasis added)

Davis v. Alaska, supra, 319, 320.

Although the state does have an interest in promoting effective law enforcement and protecting the complainant's privacy, this interest cannot be deemed superior to Mr. Lucas' Sixth Amendment rights. Mr. Lucas' theory was that the complainant fabricated her story in retaliation for the bitter ending of their long term relationship. Without being able to explore the full prior relationship between the parties, Mr. Lucas' defense was undermined by the strict application of the notice provision of the rape shield law. Consequently, he was denied a fair trial.

B. The Defendant's Fundamental Rights To Present A Defense And Cross-Examine Witnesses Outweigh The State's Interests

Courts and legal writers agree that the *Chambers* and *Davis* decisions set forth the standard to be applied for resolving questions pitting a state's interest in evidentiary rules against a defendant's constitutional right to confront witnesses or present evidence.[8] Two views have emerged. The first view requires merely a general balancing between the state's and defendant's interest.[9]

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[8] *State v. Pulizzano,* 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

[9] Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence,* Wis. L. Rev. 1219, 1256 (1985).

The second view provides that there must be a compelling state interest to overcome the defendant's constitutional rights.[10]

Recent cases decided by this Court confirm that there must be a "compelling" interest to overcome a defendant's constitutional rights, since those rights in *Chambers* and *Davis* have been described as "essential" and "vital". A general balancing test would be proper only if the state's interest, like the defendant's, were constitutionally protected.[11] More recently, this Court confirmed the important rights associated with the Sixth Amendment. In *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), this Court noted that cross-examination can be limited by things such as harassment, prejudice, confusion of the issues, witness' safety or interrogation that is repetitive or marginally relevant. *Id.* 679. The Court nevertheless recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

In *Van Arsdall,* the defendant was prohibited from cross-examining a prosecution witness regarding a bargain that had been struck between the witness and the

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[10] Tanford and Bocchino, *Rape Victim Shield Laws and The Sixth Amendment,* 128 U. Pa. L. Rev. 554, 562 (1980). *See also,* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. at 580.

[11] *State v. Pulizzano, supra,* Note 8, at 456 N.W.2d 334. According to Professor Westen, in guaranteeing the defendant the right to produce witnesses, the framers (of the Constitution) were content to incorporate by reference whatever rules of evidence the state might fashion to govern admissibility, but intended to subject those rules to an independent constitutional standard. *See,* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, supra,* 591-593.

prosecutor in exchange for his testimony. The Court stated:

> We think that a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a proto-typical form of bias on the part of the witness and thereby to "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." . . . *a reasonable jury might have received a significantly different impression of [the witness'] credibility* had respondent's counsel been permitted to pursue his proposed line of cross-examination. (Emphasis added)

Delaware v. Van Arsdall, supra, at 680.

This Court recently had an opportunity to review a rape shield statute in connection with a defendant's Sixth Amendment rights. In *Olden v. Kentucky,* 488 U.S. 227 (1988), the defendant was charged with, among other things, rape. Defendant's defense was consent. His theory was that the victim had lied about the alleged rape in order to placate her boyfriend who observed her getting out of defendant's automobile. The complainant and her boyfriend were living together and defendant contended that it was crucial to his defense to be allowed to introduce that evidence. The trial court granted the prosecutor's motion *in limine* to keep such cohabitation evidence from the jury.

In a *per curiam* decision, this Court reversed the Kentucky court stating that the Kentucky Court of Appeals failed to accord the proper weight to the petitioner's Sixth Amendment right to be confronted with the witnesses against him.

Similarly, in *Crane v. Kentucky,* 476 U.S. 683 (1986), the defendant had been prohibited from testifying as to the

circumstances involving his confession, There, the trial court had concluded that the confession was voluntary. Accordingly, it determined as a matter of law that the defendant would be prohibited from testifying before the jury facts concerning the circumstances of his confession. The defendant was prohibited from testifying that he had been surrounded by police officers and badgered into making a false confession. The Court in *Crane,* in balancing the state's interest against the defendant's right to present a defense stated,

> Nonetheless, without "signaling any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial.

Crane v. Kentucky, supra, 690.

The *Crane* Court concluded that whether its rooted directly in the "due process clause of the Fourteenth Amendment" or the "compulsory process or confrontation clauses" of the Sixth Amendment, the Constitution guarantees that defendants shall have a meaningful opportunity to present a complete defense.

In *Rock v. Arkansas,* 483 U.S. 44 (1987), the trial court prohibited all of the defendant's hypnotized testimony because it was unreliable. Again, this Court engaged in a balancing test, weighing a state's procedural rules against the defendant's constitutional rights. There, this Court held:

> The right to testify in one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that are "essential to due process of law in a fair

> adversary process". . . . the necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include the right to be heard and to offer testimony . . .
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> * * *
>
> . . . the right to testify is also found in the Compulsory Process Clause of the Sixth Amendment which grants a defendant the right to call witnesses in his favor . . . (citations omitted)

Rock v. Arkansas, supra, 51, 52.

When balancing the *Arkansas* per se rule excluding all hypnotically refreshed memory testimony against the defendant's constitutional right to present evidence, the Court in *Rock* stated, "[t]his is not the first time this Court has faced a constitutional challenge to a state rule, designed to insure trustworthy evidence, that interfered with the ability of a defendant to offer testimony." *Id.* 43. This Court concluded just as a state may not apply an arbitrary rule of competence to exclude a material defense witness from taking a stand, it may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony.

It is clear that where legitimate state interests have conflicted with fundamental rights of a defendant, those state interests have generally given way.[12]

Since *Chambers* and *Davis,* this Court has been applying a strict standard to apparent violations of the Sixth Amendment. The process has been described as follows:

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[12] For example, courts have held defendants rights to cross-examination so vital to a fair trial that the informer's privilege was defeated. *Roviaro v. U.S.,* 353 U.S. 53 (1957) Further, the executive privilege claim has been defeated. *United States v. Nixon,* 418 U.S. 683 (1974).

> Whether applying this strict standard overtly or in the guise of a balancing test, the court must first decide if a case implicates a particular right or prohibition contained in the Constitution. At that stage, the Court engages in a process akin to a balancing test. As the defendant seeks to avoid more than the basic evil the amendment was designed to eliminate, the court will consider the competing interests of the state. When the state demonstrates a compelling interest, the scope of the defendant's right will be more limited than in those situations in which the state has no real interest. Likewise, as the rights important to the defendant increases, it becomes harder for the state to justify the limitation on its exercise . . .
>
> Once the process of constitutional line drawing is completed, a decision that a particular practice is central to an interest protected by an amendment will be strictly enforced.

Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U.Pa. L. Rev. 554, 563, 564 (1980).

In the instant case, the defendant was prohibited from exposing through cross-examination, the bias or motive on the part of the complaining witness. A reasonable fact finder might have received a significantly different impression of the complainant's credibility had the defense counsel been permitted to pursue her proposed line of cross-examination. Defendant was thereby deprived of a fair trial.

II. RAPE SHIELD STATUTES – CONSTITUTIONAL ON THEIR FACE, BUT NOT AS APPLIED

The question that now must be analyzed is whether the interest sought by the state to be protected is compelling and fundamental when analyzed under the totality of the circumstances of this case.

In the past two decades, at least 48 state jurisdictions as well as the Congress and the Military have made efforts to protect rape victims from the humiliation of public disclosure of the details of their prior sexual activities. While the laws vary in scope and procedural details, they share common features of declaring an end to the presumptive admissibility of such evidence and of restricting the situations in which a defendant will be allowed to bring the victim's sexual history to the attention of the fact finder.[13] This is contrary to the common law, where such evidence was always admissible.[14]

Rape shield statutes were primarily directed against the common law use of such evidence as being "character evidence". That usage was based on the notion that women who had engaged in sexual intercourse outside of marriage had violated societal norms and, therefore, possessed the character flaw of unchastity, that is, a propensity to engage in non-marital sexual activity.[15]

Cross-examination, prior to the enactment of rape shield laws, often delved into not only the complainant's chastity, but also into matters such as the use of contraceptives, attendance at night clubs, other adulterous relationships, illegitimate offspring and other personal conduct.[16]

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[13] Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, *supra* note 10, 544.

[14] *Id.* 546.

[15] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 783 (1986).

[16] *See*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977).

Respondent has no quarrel with the laudatory purposes of the rape shield statute to the extent that it seeks to bar irrelevant evidence. If the evidence sought to be excluded by a rape shield statute is irrelevant, or if its probative value is substantially outweighed by its prejudice, the Sixth Amendment does not mandate its admissibility. Defendant concedes that at a criminal trial, a defendant has no constitutional right to present irrelevant, prejudicial evidence in his behalf. *Delaware v. Van Arsdall, supra*. Therefore, review of the proper scope of rape shield legislation must focus on those instances in which sexual conduct evidence would be relevant and sufficiently critical to the defense, such that the Sixth Amendment would mandate its introduction.[17]

In his survey of the rape shield statutes in the nation, Professor Galvin concluded that even the most ardent reformers have acknowledged that there is a high probative value of past sexual conduct when the defendant claims consent and establishes prior consensual sexual relations between himself and the complainant.[18] While most states, including Michigan, have held that rape shield statutes are constitutional on their face,[19] many

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[17] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade*, *supra* 806, 807.

[18] *Id.* 807.

[19] *People v. LaLone*, 432 Mich. 103, 487 N.W.2d 431 (1989), where the Michigan Supreme Court held that the rape shield law did not violate the defendant's Sixth Amendment right of confrontation where the defendant attempted to introduce evidence of the complainant's sexual history with respect to third persons. In *People v. Arenda*, 416 Mich. 1, 330 N.W.2d 814 (1982), the Michigan court again held that the rape shield

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other courts have been finding ways to avoid unjust consequences and preserve a defendant's fundamental Sixth Amendment rights by finding rape shield statutes either unconstitutional as applied or simply avoiding them altogether.[20] In response to the strict prohibitions of the rape shield law, courts have held rape shield statutes unconstitutional as applied in particular factual settings,

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statute was constitutional on its face, where, once again, the defendant sought to introduce the sexual history of the complainant as said history pertained to third parties. The Michigan court in *Arenda*, in note 7, listed numerous jurisdictions that held such statutes constitutional on their face. However, these cases involve instances of prior sexual history between the complainant and third parties.

[20] In *People v. Hackett*, 421 Mich. 338, 365 N.W.2d 120 (1984) the Michigan Supreme Court stated:

> We recognize that in certain limited situations, such evidence (prior sexual conduct) may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover, in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. *Id.* 421 Mich. 348 (citations omitted)

Notably, none of the relevant purposes for sexual conduct evidence mentioned by the court in *Hackett* appear in the Michigan rape shield statute as an exception to the general prohibition; evidence of sexual conduct with the accused and alternative physical consequences evidence are the statute's only exceptions.

or they have engaged in the traditional balancing of the probative value against prejudicial effect.[21]

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[21] *People v. Perkins*, 424 Mich. 302, 379 N.W.2d 390 (1986) was a case similar to this matter. There, the trial court permitted the introduction of the sexual history *between the parties*. The court in *Perkins* stated:

> Because the proposed testimony in this case related to the sexual activity between the complainant and the defendant, the strong prohibitions on evidence of a complainant's past sexual activities, which we have discussed in several recent opinions, are not involved. As the statute indicates, we are faced with the more usual evidentiary issues of the materiality of the evidence to the issues in the case *and the balancing of its probative value with the danger of unfair prejudice*. . . . the critical issue at trial will be whose version of the events . . . was a correct one. . . . if a fact finder . . . were to believe the defendant's description of the encounter of the previous week, that evidence could influence his decision as to whether the events on (the date of the assault) amounted to an assault or were consensual. *Id.* 424 Mich. 307, 308. (Emphasis added)

Further, numerous state courts have held their various rape shield statutes unconstitutional as applied where the materiality or probative value of such evidence clearly outweighs the prejudicial effect, notwithstanding the prohibitions in rape shield statutes. *E.g., Commonwealth v. Black*, 47 A.2d 396 (PA. 1985), holding that the rape shield law which prohibited the demonstration by defendant of a witness' bias, interest or prejudice unconstitutionally infringed upon the defendant's right of confrontation under the Sixth Amendment; *Summitt v. State*, 697 P.2d 1374 (Nev. 1985), hoiding that defendant was denied his right to confrontation where the use of prior sexual history of the complainant was to challenge credibility; *State v. Howard*, 426 A.2d 457 (N.H. 1981) where the New Hampshire court held the defendant was denied his right to present a defense and to confront witnesses, the probative value

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The process which has developed both in Michigan and elsewhere is that courts, despite the legislative prohibitions, have concluded that evidence will be admitted based on the traditional balancing of the probative value versus prejudicial effects.[22] Courts have concluded that the underlying legislative purpose was to remove from the fact finding process the sexist and outdated notions that a woman who engages in non-marital sexual conduct for that reason alone is more likely to consent or to lie under oath.[23] The consensus both by the courts and the commentators is that relevant evidence should be admitted, subject to the traditional tests of weighing the probative value versus the prejudicial effect.

In this case, defendant was not seeking to establish that the complainant was unchaste or immoral. Rather, he was attempting to present information to the fact finder which would have put his defense of consent in the proper context. As such, the evidence was more probative than prejudicial and should have been admitted.

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outweighing the prejudicial value; *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), where the relevancy and probative value of the prior sexual conduct was material to the case and therefore constitutionally protected as to inquiry thereof.

[22] Galvin, *Shielding Rape Victims In State and Federal Courts: A Proposal For the Second Decade, supra* at 875; Tanford & Bocchino, *The Rape Shields Laws and the Sixth Amendment, supra* at 570, 571.

[23] Galvin, *Shielding Rape Victims In State and Federal Courts: A Proposal For the Second Decade, supra* at 875.

III. DESPITE COUNSEL'S FAILURE TO FILE A TIMELY NOTICE, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED THE PRECLUSION SANCTION, PROHIBITING CROSS-EXAMINATION OF AN ESSENTIAL WITNESS AND PREVENTING DEFENDANT FROM PRESENTING AN EFFECTIVE DEFENSE

A. Notice Requirements, While Constitutional, Should Not Be Used to Preclude A Defendant From Presenting A Defense Where The Failure To File A Timely Notice Was Not Willful, Intentional Or Designed To Obtain A Tactical Advantage

Under the Michigan rape shield law, if a defendant wishes to introduce evidence of the prior sexual relationship between the parties, which is permitted under the Michigan statute, a motion (notice)[24] must be filed within

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[24] Michigan is the only state in the nation to require such an early notice requirement. Although the times can vary, generally speaking in the Wayne County Circuit and Recorder's Court, the minimum time between the arraignment on information and the trial date is two months. Other states are as follows: Ar. Stat. Ann. § 41-1810.1-2 (1977) (3 days before trial, unless good cause shown); Fed. R. Evid. 412 (motion due 15 days before trial, unless new evidence); GA. Code Ann. § 38.202.1 (Supp. 1979) (hearing any time prior to introduction); Ind. Cod. Ann.§ 35-1-32.5-1 to 3 (Burns Supp. 1978) (amended 1979) (motion due 10 days before trial, unless good cause shown); Ky. Rev. Stat. Ann. § 510.145 (Baldwin Supp. 1978) (motion due 2 days before the trial, unless good cause shown); Md. Ann. Cod. Art. 27, § 461A (Supp. 1979) (motion due any time before trial, unless good cause shown); Mass. Ann. Laws, Ch. 233, § 21B (Michie/Law Co-op Supp. 1978) (hearing before introduction of the evidence); Min. Stat. Ann. § 609.347 (West Supp. 1979) (hearing prior to trial, unless good cause shown); Mo. Ann. Stat. § 491.015 (Vernon Supp. 1979) (motion prior to the introduction of the evidence); Mont. Cod.

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ten days of the arraignment on the information.[25] The statute is silent as to the consequences of failing to file a

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Ann. § 45-5-503 (5) (1978) (motion prior to the introduction of the evidence); Neb. Rev. Stat. § 28-321 to 323 (Supp. 1978) (motion prior to introduction of evidence); N.C. Gen. Stat. § 8.58.6 (Supp. 1977) (amended 1979) (motion before or during trial); Oh. Rev. Cod. Ann. § 2907.02(D)-02(F) (page Supp. 1978) (motion at least three days before trial, unless good cause); Or. Rev. Stat. § 163.475 (1977) (motion before trial, unless good cause shown); 18 Pa. Cons. Stat. Ann. § 3104 (Purdon Supp. 1979-1980) (motion at the time of trial); S.C. Cod., § 16-3-659.1 (Supp. 1978) (motion before the introduction of said evidence); Tenn. Cod. Ann., § 40-2445 (Supp. 1978) (motion before introduction of evidence); Vt. Stat. Ann., Tit. 13, § 3255 (Supp. 1979) (motion before introduction of evidence) Wash. Rev. Cod. Ann., § 9.79.150 (1978) (motion before trial); W.Va. Cod. § 61-8B-12 (1977) (motion before introduction of evidence); Wis. Stat. Ann. § 971-31, 972.11 (West Supp. 1979-1980) (motion before trial).

[25] In Michigan, there are notice requirements in the event that a defendant wishes to raise an alibi defense or an insanity defense. MCL 768.20; MSA 28.1043 provides that the defendant shall at the time of the arraignment on the information or within 15 days after the arraignment on information, but not less than 10 days before the trial of the case, or as such other time as the court directs . . . file and serve on the prosecuting attorney a notice in writing of his intention to use the alibi defense.

MCL 768.20a; MSA 28.1043(1) provides that in the event that the defendant wishes to raise a defense of insanity or diminished capacity, a notice must be served within 30 days of trial or at such time as the court directs. Although MCL 768.21, MSA 28.1044 allows for the preclusion of such evidence or defense in the event that these time periods are not complied with, Michigan courts considering the preclusion of such evidence have held that preclusion should be exercised only in extreme circumstances, where facts clearly warrant, otherwise

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timely notice. Although this Court has not considered notice provisions of rape shield laws, it has considered notice provisions in other contexts.

Williams v. Florida, 399 U.S. 78 (1970) upheld the constitutionality of a notice requirement for an alibi defense. Several reasons were given for the rationale that the notice provision was constitutional.[26] The court in *Williams* in holding the alibi notice rule constitutional, stated that there was an important state interest in eliminating eleventh hour defenses which can be easily fabricated, that the notice requirement was reciprocal and that the Florida rule was "designed to enhance the search for the truth in the criminal trial". *Id.* 82, 83.

In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court was presented with the question of whether the preclusion sanction for the failure of the defendant to disclose a witness violated his rights under the Sixth Amendment. The Court held that although preclusion for violation of discovery rules may be justified, such preclusion can only be constitutionally justified under the most egregious circumstances.

There, the trial court precluded the testimony of a defense witness where the defendant's attorney failed to disclose that witness pursuant to a discovery order. The

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a defendant's right to present a defense will be impeded, contrary to the Sixth Amendment. *See, People v. Bennett*, 116 Mich. App. 700, 323 N.W.2d 520 (1982). Also, in *People v. Bell*, 169 Mich. App. 306, 425 N.W.2d (1988), the court held that trial courts have discretion in allowing or disallowing the evidence.

[26] The Florida statute required the defendant to file the names and addresses of any alibi witnesses with the prosecutor at least 30 days prior to trial. Fla. Rule Crim. Proc. 1.200.

Illinois Court Rule provided that upon the prosecutor's discovery request, defendant's attorney was required to, among other things, provide a list of defense witnesses. Defense counsel filed the list of witnesses well before trial, however, on the first day of trial, defense counsel was allowed to amend that list by adding the names of two other witnesses. On the second day of trial, defense counsel moved to add two more witnesses to his list by way of oral motion, and stated to the court that he had just been made aware of these witnesses.

The trial court ordered the defense counsel to bring in the witness and defendant's counsel was permitted to make an offer of proof outside the presence of the jury. This witness, as it turned out, had not been an eyewitness to the incident itself. Moreover, this witness testified that the defense counsel had visited him a week before the trial actually began, thereby, completely contradicting the representations made by defense counsel to the trial court. The trial court, in precluding the defendant's witness stated two things. First, it found that it was an intentional violation of the discovery rules. Second, the trial court questioned the value of this eleventh hour witness and seriously questioned whether he was an eyewitness at all.

This Court, contrary to the prosecutor's argument, reaffirmed a defendant's constitutional right to present a defense, which is grounded in the Sixth Amendment. The Court stated, "[w]e cannot accept the state's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes testimony of a material defense witness". *Id.*, 409.

After having determined that the defendant's rights under the Sixth Amendment can be violated by the preclusion of a material defense witness, the *Taylor* Court then turned its attention to whether facts of that case warranted a finding that defendant had been deprived of his right to present a defense. In concluding that the defendant's rights under the Sixth Amendment were not violated, this Court looked to the specific facts and stated:

> The trial judge found that the discovery violation in this case was both willful and blatant. In view of the fact that petitioner's counsel had actually interviewed Wormley (the defense witness) during the week before the trial began and the further fact that he amended his answer to discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, **the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severe sanction is appropriate.** After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. . . . the pre-trial conduct revealed by the record, *in this case* gives rise to a sufficiently strong inference that 'witnesses are being found that really weren't there' to justify the sanction of preclusion. (Emphasis added)

Taylor v. Illinois, supra, 416, 417.

The Court further noted[27] that in Illinois (as in Michigan), the sanction of preclusion is reserved only for the most extreme cases.

The Court in *Taylor* determined that the trial judge may certainly insist on an explanation for a party's failure to comply with a discovery request. The general rule that the Court set forth in light of the facts of *Taylor* is:

> If the explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to reduce rebuttal evidence, it will be entirely consistent with the purposes of the confrontation clause simply to exclude the witness' testimony. Cf. *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)

Id., 415

Accordingly, while this Court and other state courts have upheld the preclusion sanction under certain circumstances, based on the facts in *Taylor* and the pertinent state cases, preclusion of a material defense witness can only be countenanced in the extreme case. The facts in this matter hardly arise to the extreme case as contemplated in *Taylor*.

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[27] In footnote 23 of *Taylor*, this Court observed that the Illinois courts have held that, "[t]he exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a deliberate contumacious or unwarranted disregard of the court's authority . . . the reasons for restricting the use of the exclusion sanction to only the most extreme situation are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense."

B. The Trial Court Abused Its Discretion When It Concluded It Had No Choice But To Deny Defendant's Motion Because It Was Untimely

Defendant has consistently argued that the trial court abdicated its discretion when it denied defendant's motion to allow evidence and cross-examination concerning the prior sexual relationship between the complainant and himself.[28]

Defendant's trial counsel requested the trial court to permit testimony and inquiry of the prior sexual intercourse between the parties. This was done at the first day of trial. (R. 3) As Ms. Williams, defendant's newly appointed attorney, indicated, she was not the attorney of record representing the defendant when the motion should have been made. (R. 3) The prosecutor objected to the motion for the reason that the motion had to have been made within ten days of the arraignment on the information. (R. 4) Defendant's trial counsel further stated to the court that while her motion was untimely, there was little she could do, since Mr. Lucas had another attorney at the time it was appropriate to make the motion. (R. 5) The trial court inquired as to why the motion had not been made earlier, (R. 5) and reviewed the statute. The trial judge, stated that, "[l]et me check the statute. If the statute says I'm precluded from it . . . " (R. 6)

The trial court concluded that since none of the requirements of the statute had been complied with, "[u]nless this information is filed or discovered during the course of the trial, I would have to (sic) rights to go into that, but your motion is respectfully denied". (R. 6)

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[28] See Argument II, pg. 12 of Respondent's Brief in the Michigan Court of Appeals

Here, the trial court in effect stated that he was precluded from taking any further action, pursuant to the statute. However, in Michigan, a trial court always has the discretion to postpone a trial if justice requires. It is well settled that a trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails to exercise it. *People v. Merritt*, 396 Mich. 67, 80, 238 N.W.2d 31 (1970); *People v. Jackson*, 391 Mich. 323, 332, 217 N.W.2d 22 (1974). In *Merritt*, the court found that where a notice of alibi was filed on the first day of trial, a continuance should have been granted to avoid the preclusion of those witnesses.

The Court in *Merritt* set forth the appropriate approach that should be undertaken to determine whether the trial court abused its discretion, relying upon *Ungar v. Sarafite*, 376 U.S. 575 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama*, 308 U.S. 444 [60 S.Ct. 321; 84 L. Ed. 377 (1940)]. Contrawise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3 [75 S.Ct. 1; 99 L. Ed. 4 (1954)]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385 [77 S.Ct. 431; 1 L. Ed. 2d 415 (1957)]"

Id. 80, 81.

The *Merritt* court analyzed the trial court's discretion in precluding exculpatory evidence as a sanction for non-compliance with alibi notice statutes. There, the attorney failed to timely file due to illness. The court in *Merritt* found that when neither the fault of the defendant nor prejudice to the state is present, preclusion of the defendant's alibi evidence is an abuse of discretion. *Merritt, supra*, 82-83.

The court in *Merritt* applied the holding of *People v. Williams*, 386 Mich. 565, 578, 194 N.W. 2d 337 (1972) to create a four-part test for determining whether the preclusion sanction should be applied: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has standing to assert that right; (3) whether the defendant was guilty of any negligence; and (4) whether the defendant purposely engaged in any delaying tactics. *Id.*, 396 Mich. at 81. Here, as in *Merritt*, defendant's fundamental rights were at stake. Here, the defendant, himself was not negligent and clearly there is no allegation or evidence that the failure to file the notice was done deliberately or to gain some tactical advantage.

The Court in *Merritt* was consistent with *Ungar v. Sarafite, supra*, and *Taylor v. Illinois, supra*, when it concluded,

> The preclusion sanction is an extremely severe one, and the judge's discretion in exercising preclusion should be limited only to an egregious case. Clearly, it would be improper to exclude the defense where neither serious abuse of the right on the part of defendant nor prejudice to the people's case have been demonstrated.

People v. Merritt, supra, 82.

In failing to recognize that it had discretion, the trial court failed to consider two likely resolutions to the issue

which would have balanced the state's interest in receiving notice against defendant's constitutional rights. First, it could have granted an adjournment to the prosecutor, since it was the state who was objecting to the introduction of the evidence for lack of timeliness. In the alternative, the court could have conducted the *in camera* hearing the day of trial. There was no need to find and interview other witnesses, which is at least one of the reasons or purposes for the notice provision. Here, the only witness was the complainant and she was in court. The court could have easily conducted a hearing to determine admissibility. However, since the trial court failed to recognize it had that type of discretion, it committed reversible error.

C. Failure To File A Timely Notice Should Not Preclude Mr. Lucas From Testifying In His Own Behalf.

The constitutional error in this matter included the prohibition of defendant from testifying in his own case regarding material and relevant facts to his defense.[29] The rape shield law is designed to protect the victims of rape, not to prevent a defendant from testifying.

In *Alicea v. Gagnon*, 675 F.2d 919 (7th Cir. 1982) that Circuit was presented with this exact question. There, the Wisconsin trial court implemented the preclusion sanction against a defendant who did not give a timely alibi notice. The defendant was prohibited from testifying that he was at home during the time of the robbery and had received telephone calls.

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[29] Although the Government's Amicus Brief suggests that this was not raised in this matter, such is not the case. *See*, Appellant's Brief on Appeal, pages 17, 18.

The Court in *Gagnon* first noted that many commentators contend that absolutely excluding a *defendant's* alibi testimony for lack of notice should be unconstitutional.[30] After reviewing *In Re Oliver*, 333 U.S. 257 (1948)[31], *Faretta v. California*, 422 U.S. 806 (1975)[32], and the *Brooks v. Tennessee*, 406 U.S. 605 (1972)[33], the *Gagnon* court concluded that a defendant does have a constitutional right to testify by stating:

> If the search for truth is to have meaning, surely the most important figure in the controversy, whose very freedom hangs in the balance, must have a right to participate directly. We believe the fifth, sixth, and fourteenth amendments require no less. **We therefore hold that a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments.** *Id.* 923. (Emphasis added)

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[30] Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 137-39 (1974); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 830-41 (1976); Note, *The Preclusion Sanction – Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342, 1364 (1972). *See also*, Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567 (1986).

[31] Certain rights are basic to our system of jurisprudence, including as a minimum the right to examine witnesses (and) to offer testimony. *Id.* 273.

[32] The Court listed a defendant's right to testify in his own behalf as one of a number of constitutional rights essential to due process of law in a fair adversary process. *Id.* 819, n. 15.

[33] The court found that whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. *Id.* 612.

The Court then considered whether the defendant's constitutional right to testify in his own behalf was impermissibly interfered with by Wisconsin's alibi-notice statute. The court closely examined the state's interests and found that the purpose of such statute was to prevent the fabrication of alibis. *Id.* 924. However, the court stated:

> But we cannot see how that interest is promoted by precluding a defendant's testimony for failure to give notice. The principal reason for notice rules, as we noted at the outset of this opinion, is prevention of surprise to the state, not punishment of the accused for mere technical errors or omissions. In this situation, it is difficult to see how the government can claim surprise. As an essential part of its case, the state must prove a defendant's presence during the commission of an alleged crime, proof which invariably requires pretrial investigation and preparation. *Id.*, 924.

Similarly, in *People v. Merritt, supra,* the Michigan Supreme Court came to the same conclusion, based upon a statutory construction analysis. The rationale for this conclusion was stated as follows:

> Defendant is already in custody, or at least available to the prosecutor. **While there may be a necessity to learn something about other witnesses who have not hitherto been available, that necessity is not present where the defendant is concerned. Should defendant suddenly develop an alibi after having told a different story, he or she may be impeached by the prosecutor.** Further, the chance that the finder of fact may not choose to believe defendant's unsubstantiated testimony is itself sufficient motivation to promote timely filing. **In any event, whether defendant was at the scene of the alleged crime would seem to be a fundamental question, and the information should reasonably be developed early in the investigation process.**

People v. Merritt, supra, 88 (Emphasis added)

Here, Lucas was prohibited from testifying as to his prior sexual relationship with the complainant. The purpose of the rape shield law is to protect the complainant, not punish the defendant. Further, as has been indicated, the prosecutor as well as the complainant had ample notice of defendant's defense from the detailed testimony elicited at the preliminary examination. To then preclude the defendant at trial from testifying to such critical facts denied him his fundamental right to testify and present a defense.

D. Mr. Lucas Should Not Be Punished For The Negligence Of His Lawyer.

Mr. Lucas argued in the Michigan Court of Appeals that he was denied effective assistance of counsel because his attorney failed to file a motion and notice permitting the inquiry into the prior sexual relationship of the parties.[34]

Unlike the facts in *Taylor v. Illinois, supra,* there is no claim that defendant's counsel in this matter intentionally, willfully or otherwise wantonly disregarded a court order or statute to gain a tactical advantage. Indeed, as suggested by the case "inquiry report", there seems to

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[34] See Argument I of Appellant's Brief in the Michigan Court of Appeals entitled, "Defendant did not receive his constitutional right to effective assistance of counsel where his trial attorney failed to timely make a motion, pursuant to the rape shield law, to seek an order permitting cross-examination of the complainant regarding the prior sexual conduct of the parties".

be some question as to whether the defendant was actually represented by counsel at the critical time. Nevertheless, had his first attorney filed a timely notice, the results of the proceeding would have been different and therefore, defendant's counsel fell below the objective standard of reasonableness, denying defendant a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, the defendant withheld no information. On the contrary, he was forthright and was willing to take the stand, gave statements to the police and in effect, communicated with anybody who would listen. The notice requirement in Michigan requires that a written motion and offer of proof be filed with the court within ten days of the arraignment on the information. This type of legal work is out of the hands of an individual defendant. No defendant is required to know the technicalities of various time limits prescribed by statutes. Attorneys are expected to know these deadlines.

Because of his attorney's negligence, defendant was deprived of a fair trial. The remedy here, should not have been to punish the defendant by excluding his right to present a defense by cross-examining the chief witness. The remedy should have been to either adjourn the trial, or conduct an immediate *in camera* hearing at the time of trial. The punishment of defendant for the negligence of his attorney served no valid legal purpose.

IV. THE PURPOSES BEHIND THE MICHIGAN RAPE SHIELD STATUTE WERE INAPPLICABLE IN THIS CASE

A. There Was No surprise to the Prosecutor or the Complainant Regarding the Proposed Testimony

One of the purposes of the notice provision contained in any type of discovery rule is to avoid unfair surprise,

either to the prosecutor or to the witness. *Williams v. Florida, supra.*

However, here as the Michigan Court of Appeals found, there would be no issue of an eleventh hour witness since both parties were in court. The trial court would merely have to engage in the normal balancing tests when the issue presented itself.

As was stated by the Michigan court in this matter, in *People v. Lucas*, 160 Mich. App. 692, 694, 408 N.W.2d 431 (1987):

> The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses it logical underpinnings however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a defendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An *in camera* hearing will necessarily focus on the complainant's word against the word of a codefendant. **Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time. . . . this ten-day notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant.** (Citing *People v. Williams*, 95 Mich. App. 1, 9-11; 289 N.W.2d 683 (1980) *rev'd on other grounds*, 416 Mich. 25 (1982)) (Emphasis added)

Here, the prosecutor was on notice from the preliminary examination, the earliest proceeding in this criminal prosecution. Mr. Lucas took the stand and gave notice

that his defense was consent, and that he and the complainant had not only consented that particular evening, but they had engaged in a consensual sexual relationship for the past six or seven months. Throughout the proceedings, Mr. Lucas continually maintained that his defense was predicated on the long term sexual relationship between the parties. By no stretch of the imagination, can the prosecutor, or for that fact the complainant, claim any surprise by the defense of Mr. Lucas at the time of trial.

B. Complainant Had Previously Been Cross-Examined As To The Prior Sexual Relationship Of The Parties, Therefore, That Underlying Purpose Of The Rape Shield Law Was No Longer Applicable

The Michigan Rape-Shield statute reflects the Michigan Legislature's determination that in the overwhelming majority of prosecutions, the introduction of the complainant's sexual conduct with the parties other than the defendant, is neither an accurate measure of the complainant's voracity nor determinative of the likelihood of consensual sexual relations with the defendant. *People v. LaLone, supra,* at 432 Mich. 125. Accordingly, the overall purpose of the rape shield law is to exclude that evidence as being irrelevant or intrusive into the private concerns of a complainant.

However, in the instant case, these very issues were examined without objection by the prosecutor at the preliminary examination. She already testified as to having sex with him. (R. Prem. Exam. 23) She already testified in the affirmative, that she had conventional as well as oral sex. (R. Prem. Exam. 23) She was already asked whether she performed fellatio on him and whether he performed cunnlingus on her. (R. Prem. Exam. 23)

These issues were previously explored in open court and it is unlikely that additional embarrassment would have resulted to the complainant. Further, the complainant could hardly claim any surprise at being asked these questions at the time of the trial, since these very questions were already asked at the preliminary examination. The protections sought by the rape shield statute in this particular case, as they pertain to the embarrassing or humiliating features of the subject matter, had in effect already been waived at the preliminary examination. Accordingly, as applied to the facts of this case, claims by the prosecutor that the complainant would have been subjected to unfair humiliation and surprise by the untimely request are not well-founded.

C. The Evidence Which Mr. Lucas Sought To Introduce And To Seek Through Cross-Examination Was Relevant And Material To His Defense And More Probative Than Prejudicial.

Although nearly all states have rape shield laws, nearly all of those that do, including Michigan, permit inquiry into the prior consensual sexual relationship between the individual parties.[35]

States have recognized that such an inquiry is more probative than prejudicial when it comes to the question of consent, when a defendant is charged with some violation of the criminal sexual conduct statute. The fact finder in this case was not allowed to hear from the complainant or defendant any information as to the degree and seriousness of the parties' prior sexual relationship. As was obviously demonstrated at the preliminary examination,

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[35] Galvin, *Shielding Rape Victims in State and Federal Courts: A Proposal for the Second Decade, supra.*

the relationship of the parties was not of a short duration or transitory affair. In addition to the numerous instances of prior sexual relations, the parties had contemplated marriage. Moreover, if the fact finder had been apprised of the complete history of the prior sexual/social relationship, then some of the other parts of the testimony would have fit more cleanly together as part of the overall puzzle. Further, it would have added credibility to the defendant's testimony at trial that the reason that the complainant was at his house was not through force but as a previously scheduled date.

Although in his brief, petitioner suggests that the judge in this matter was aware of the parties' previous sexual relationship, (Pet. Br. 88, 89) there is no evidence of this fact in the record and to come to such a conclusion, is only speculation. Indeed, the judge, at the time of rendering his decision in this matter, articulated his reasons on the record and the basis for his decision. (R. 262-266) Petitioner only speculates that the trial court knew of the parties' extensive sexual relationship; there is nothing in the record to substantiate it.

Had the fact finder been permitted to hear from the complainant or defendant the extent of the parties' sexual relationship, the impact of that evidence would have had an effect on both the credibility of the defendant as to his testimony and would have been certainly probative on the issue of consent. Defendant's theory was that the complainant had made these false allegations because a long term relationship ended. Certainly, without having the extent of that relationship known, the fact finder would be fishing without bait when it ruled on this case. The standard that must be looked to in this particular situation, is that set forth in *Olden v. Kentucky, supra,* 232, where this Court stated:

> It is plain to us that a "reasonable jury (fact finder) might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination. (citing *Delaware v. Van Arsdall* at 680)

Olden and *Van Arsdall* require examination of the excluded evidence to determine whether, presented with that evidence, a reasonable fact finder might have received a significantly different impression of a complainant's credibility or motive. Here, similarly, had the fact finder been apprised of the lengthy intimate history of these parties, a significantly different impression would have been created. *Olden* and *Van Arsdall* do not stand for the proposition that the outcome would have been different, only that a different impression would have been observed by the fact finder. The Michigan Court came to the same conclusion by holding that the error was not harmless, and that the fact finder would have had a different impression.

Here, the very essence of defendant's defense of consent was hinged upon the extensive relationship of the parties. The defendant was not seeking to introduce any evidence of sexual relationship with third parties nor was he attempting to use this evidence to establish the fact that the complainant was somehow unchaste or an immoral person. Any time a person is asked personal questions, particularly of a sexual nature, embarrassment or humiliation may occur to a normal person. Nevertheless, that is part of our jurisprudence and when comparing the unfair prejudice to the extreme probative value, the evidence must be deemed material, relevant, and

accordingly, it should have been permitted.[36] Additionally, this evidence would have been critical to defendant's theory, which was the complainant fabricated the allegations after ending a long term intimate relationship due to the fight. Without that evidence, the fact finder would justifiably find it difficult to believe or even understand defendant's theory.

V. THE ERROR COMMITTED BY THE TRIAL COURT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Petitioner contends that if there was error in this case, such error was harmless beyond a reasonable doubt. (Pet. Br., 83-90)

This argument fails for two reasons. First, unlike *Van Arsdall*, the Michigan Court of Appeals was directed to consider that specific issue by the Michigan Supreme

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[36] MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added) In Michigan, as is the case in all states, trial courts are called upon in almost every trial to make decisions whether a particular piece of evidence is, although relevant, more prejudicial than probative. What the trial court was faced with in this particular situation is no different than a situation where, for instance, a prosecutor presents bloody photographs at the time of trial and defense counsel objects, claiming that they are too prejudicial. At that point, the jury is simply excused, arguments are had regarding the probative value versus prejudicial effect and ultimately a decision is made, one way or another. Here, the trial court could have simply conducted that normal inquiry, notwithstanding the purported notice requirement of the statute.

Court. When reviewing that specific question, the Michigan Court of Appeals concluded that the error was not harmless beyond a reasonable doubt, because credibility of the parties was central to the case. Accordingly, the error contributed to the verdict obtained. *Chapman v. California*, 386 U.S. 18 (1967).

In *Van Arsdall*, this Court found the Delaware Court "offered no explanation why the *Chapman* harmless error rule" was inapplicable. *Delaware v. Van Arsdall, supra* 680. In *Van Arsdall*, this Court stated the general rule in these matters to be that "[w]e believe that the determination whether the confrontation clause error in this case was harmless beyond a reasonable doubt *is best left to the Delaware Supreme Court in the first instance. Id.* 684.

Here, the Michigan Court has decided the question. Specifically, it found that the witness' testimony to be critical to the prosecutor's case. In such a circumstance, the Michigan Court correctly concluded that this error was not harmless beyond a reasonable doubt.

Second, even if this Court were to conduct an independent analysis, and not give weight to the Michigan Court's finding, the only conclusion can be that the error was not harmless beyond a reasonable doubt. In *Van Arsdall*, this Court set forth factors to be considered when determining whether error is harmless:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradictory of the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecutor's case.

Id. 684.

Here, all factors point to this not being harmless error. The testimony which was sought was from the only "eyewitnesses", the complainant, and the defendant. No other witness presented at trial had any direct knowledge of the facts in this case. There was no other evidence on this point permitted, other than vague references that the defendant may have contracted a venereal disease from the complainant. However, petitioner misses the point, because the relevancy of this prior sexual history between the parties is not that they had sex once, but that it was long-term and was combined with a very serious relationship. The failure to permit cross-examination on this important point or to permit defendant even to testify as to those facts was error that clearly impacted upon the outcome of the verdict. Therefore, it can not be said that this was harmless error.

CONCLUSION

For the foregoing reasons, respondent prays that this Honorable Court affirm the Michigan Court of Appeals.

Respectfully submitted,

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No. 90-149 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MICHIGAN, PETITIONER

v.

NOLAN K. LUCAS

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Michigan's rape-shield statute requires a defendant who intends to offer evidence of the victim's past sexual conduct to give advance notice and make an offer of proof regarding that evidence. The question presented is whether it violates the Confrontation Clause to bar cross-examination of the victim about her prior sexual conduct with the defendant as a sanction for the defendant's failure to comply with the statute's pretrial notice requirement.

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INTEREST OF THE UNITED STATES

The Federal Rules of Evidence contain a rape-shield provision generally similar to the provision at issue in this case. The federal rule, Fed. R. Evid. 412, requires a defendant who intends to offer evidence of specific instances of the victim's past sexual conduct to give advance notice of that intention 15 days before trial. Fed. R. Evid. 412(c)(1). Following the filing of the notice and an accompanying offer of proof, the court must conduct an in-chambers hearing to determine whether the evidence is admissible. Fed. R. Evid. 412(c)(2). Because of the similarity of the federal notice requirement to the requirement at issue in this case, the Court's analysis

here is likely to affect federal sexual abuse cases involving Rule 412.

STATEMENT

1. a. Michigan's rape-shield statute, Mich. Comp. Laws Ann. § 750.520j (West Supp. 1990), requires a defendant who proposes to offer evidence of the victim's past sexual conduct to file a written motion and offer of proof "within 10 days after the arraignment on the information." The trial court may then hold an in camera hearing to determine whether the evidence is admissible. If new information is discovered during the trial that renders the sexual-conduct evidence admissible, an in camera hearing may be held at that time.[1]

[1] The statute, Mich. Comp. Laws Ann. § 750.520j (West Supp. 1990), provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

b. Respondent was charged with two counts of criminal sexual conduct, in violation of Mich. Comp. Laws Ann. § 750.520d (West Supp. 1990), and was tried before a judge of the Circuit Court of Wayne County, Michigan. On the first day of trial, respondent's counsel requested that the court allow, "throughout this trial, testimony concerning prior sexual intercourse between the defendant and the complainant, even though I know it goes against the Statute." Tr. 3. Counsel explained that she had not been appointed until after the time for filing a motion under the rape-shield statute had expired. *Ibid.* The prosecutor objected, citing the rape-shield statute and explaining that its procedures require that "a motion has to be filed * * * within 10 days of the arraignment on the information." Tr. 4. The prosecutor also noted that respondent had been represented by different counsel at the preliminary examination and the arraignment on the information, but that respondent's present counsel had been appointed well before the trial. *Ibid.*

Respondent's counsel acknowledged the untimeliness of her motion, but stated that respondent "has rights too, and that is the right to defend himself as vigorously as he possibly can. * * * Much of [respondent's] defense * * * centers around the sexual intercourse that he did have in previous months prior to the day of the incident." Tr. 5. When the trial judge asked respondent's counsel why the motion was not made earlier, she replied that "I was not aware that I could have made it because [respondent] had a different attorney. In fact, I was appointed to this

case one week prior to trial initially when he had his first attorney." *Ibid.*[2]

After reviewing the Michigan rape-shield statute, the court denied respondent's motion. The court explained that "[n]one of the requirements set forth in [the statute] have been complied with." Tr. 6. The court noted that not only had respondent failed to give timely notice, but "the Court should have [had] an in camera hearing on the evidence, which has not been done." *Ibid.* Accordingly, the court ruled that unless new information was discovered during the trial, evidence covered by the rape-shield statute would not be admitted. *Ibid.*

2. At trial, the alleged victim, Wanda Brown, gave the following account: Prior to August 31, 1984, respondent had been involved in a boyfriend-girlfriend relationship with Brown for approximately six to seven months. In mid-August, Brown and respondent became estranged. Brown stopped dating respondent because of concerns about aspects of his personality and behavior. Pet. App. 2a; Tr. 66, 99.

On the evening of August 31, at about 10:30 p.m., Brown was walking from her house to a nearby gas station to purchase cigarettes. On the way, she passed respondent's house. Respondent approached her, brandished a pocket knife, grabbed her by the arm, and forced her into his house. Inside the house, respondent beat her, held his knife to her throat, and made her

[2] Although the transcript is confused on the issue of when respondent's trial counsel was appointed, respondent's brief in opposition in this Court states (at 3) that respondent was initially represented by retained counsel, who withdrew on November 8, 1984, 14 days after the arraignment on the information. The trial judge then appointed counsel for respondent on February 8, 1985—more than three months before the beginning of trial on May 14, 1985.

undress. Respondent then forced Brown to engage in several nonconsensual sexual acts. Brown was locked into respondent's house with him until approximately 10:00 p.m. on September 1, 1984. She arrived home with a swollen, bruised, and almost-closed right eye. Pet. App. 2a; Tr. 13-18, 22-23, 26-34, 36-39, 47-49.[3]

Respondent, the only witness for the defense, painted a different picture of the events of August 31, 1984. According to respondent, he and Brown had been involved in a close relationship since April and had seriously contemplated marriage. Respondent acknowledged that their relationship was "shaky" as of August 31, and that he and Brown had been estranged for about two weeks as of that date.[4] He testified, however, that Brown had engaged in voluntary, con-

[3] In cross-examining Brown, respondent's counsel asked whether Brown frequented any particular room in respondent's house during the time they dated. On the prosecutor's objection, the trial judge reiterated that he did not want questioning that "will by inference indicate prior sexual contact." Tr. 63. Counsel respected that limitation and did not attempt to elicit testimony about specific instances of sexual conduct involving Brown and respondent. Evidence that Brown and respondent had previously had a sexual relationship was elicited during respondent's testimony, however. See note 4, *infra*.

[4] Respondent stated that his estrangement from Brown stemmed in part from his belief that he had contracted gonorrhea from her. Tr. 182. The prosecutor objected to this testimony, citing the court's "pretrial ruling that none of this area could be touched on." Tr. 183. The court, however, permitted respondent to attempt to lay a foundation for that line of questioning by establishing that respondent had been diagnosed as having gonorrhea. Tr. 185. The questioning was inconclusive, Tr. 185-193, and respondent did not pursue it. Respondent later testified that he had been under the impression that Brown was carrying his child, but that Brown had told him otherwise on August 31. Tr. 205-206.

sensual sex with him several times during the 24 hours that Brown was in his house, and that he had not applied force to compel Brown to have sex with him. Pet. App. 2a; Tr. 164, 167-168, 180-181.[5]

The trial judge credited Brown's testimony, Tr. 263-264, and found respondent guilty on two counts of criminal sexual conduct. Although reducing the charge from a first to a third degree offense, Tr. 266, the judge concluded that respondent had used force and coercion to compel Brown to engage in sexual acts with him. Tr. 264, 266.

3. The Michigan Court of Appeals reversed, finding that the exclusion of evidence about respondent's prior sexual relationship with Brown violated his constitutional rights. In so holding, the court focused its attention exclusively on the validity of the pretrial notice-and-hearing requirements of the rape-shield statute. In *People* v. *Williams*, 95 Mich. App. 1, 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), the court had found those requirements "unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." Pet. App. 3a. The court reaffirmed that ruling in this case. *Id.* at 6a.

The court explained that the purpose of the notice requirement is to allow the prosecutor time before trial to investigate the alleged prior sexual conduct by the victim. That rationale, the court indicated, "loses its logical underpinnings" as applied to sexual conduct between the defendant and the complainant; because the relationship is "personal between the par-

[5] Respondent acknowledged slapping Brown on one occasion, but he testified that that occurred after Brown had taunted him by stating that she was pregnant by one "Ricky," and had slapped him first. Tr. 206.

ties," additional witnesses and preparation time would not be required. Pet. App. 3a, 4a. Moreover, the court added, an in camera hearing with respect to such evidence was neither necessary nor appropriate because it would "necessarily focus on a complainant's word against the word of a []defendant," *ibid.*; the court had found in *Williams* that such credibility issues are properly left to the ultimate factfinder, rather than determined by the judge prior to trial as an issue of admissibility. 95 Mich. App. at 9-10, 289 N.W.2d at 866. After concluding that the evidence had improperly been excluded for violation of the notice requirement, the court found that the evidence satisfied traditional standards for admissibility. Pet. App. 7a. Accordingly, the court set aside respondent's conviction. *Ibid.*

4. On the State's application for leave to appeal, the Michigan Supreme Court remanded the case for the court of appeals to determine whether the trial court's exclusion of the evidence was "harmless beyond a reasonable doubt." Pet. App. 8a-9a. On remand, the court of appeals found that, because the evidence of previous sexual relations went to credibility, and because "[v]irtually all of the evidence in this case consisted of complainant's word against the word of [respondent]," exclusion of the evidence was not harmless beyond a reasonable doubt. *Id.* at 11a-12a. The Michigan Supreme Court denied the State's application for leave to appeal. Pet. App. 13a.

SUMMARY OF ARGUMENT

Congress and the legislatures of many States, including Michigan, have enacted rape-shield statutes to prevent rape victims from being further victimized in court through harassing and largely irrelevant cross-examination regarding their prior sexual

behavior. A common feature of such statutes is the establishment of procedures for litigating evidentiary issues before trial in a manner that protects the victims' privacy. The Michigan Court of Appeals incorrectly held that, when the victim's prior sexual conduct involves an alleged relationship with the defendant, the Sixth Amendment forbids a State from imposing a pretrial notice requirement as a condition of introducing such evidence.

The Confrontation Clause does not give criminal defendants an unrestricted right of cross-examination. Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). More generally, procedural and evidentiary restrictions on the defendant's right to present evidence are valid unless "arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987). That consideration applies with special force to advance notice rules that do not absolutely restrict a defendant's right to offer evidence, but merely condition that right on compliance with established procedures.

The Michigan statute at issue here, like its state counterparts and Fed. R. Evid. 412, represents a valid legislative determination that rape victims, who already have undergone severe trauma, deserve heightened protection against being subjected to unnecessary further trauma in the courtroom. There is no merit to the court of appeals' holding that a pretrial notice requirement serves "no useful purpose" where the alleged prior sexual relationship involves

the defendant and the victim. In some cases, a court will be able to determine in advance of trial that evidence of the defendant's prior sexual relationship with the victim is inadmissible, thereby sparing the victim the humiliation of a public, midtrial hearing on the admissibility of that evidence. And even if the evidence of a prior sexual relationship between the defendant and the complainant is not excluded altogether, the notice-and-hearing procedure allows the trial court to fashion appropriate limits on the scope of the inquiry permitted.

It follows from the constitutional validity of an advance-notice requirement that there will be cases where preclusion of evidence is an appropriate sanction for a defendant's failure to comply with the statute. See *Taylor* v. *Illinois*, 484 U.S. 400, 410-416 (1988). But because the denial of such cross-examination may, in a particular case, seriously impede the defendant in presenting his defense, the Sixth Amendment requires a careful weighing of interests before a trial court imposes that sanction. The Michigan reviewing courts did not address the issue whether the trial court properly exercised its discretion in limiting respondent's proposed cross-examination in this case. Accordingly, the case should be remanded for the state courts to review that issue in the first instance.

ARGUMENT

THE CONFRONTATION CLAUSE IS NOT VIOLATED BY A REASONABLE REQUIREMENT THAT A DEFENDANT GIVE PRETRIAL NOTICE OF HIS INTENTION TO CROSS-EXAMINE AN ALLEGED RAPE VICTIM ABOUT HER PRIOR SEXUAL CONDUCT WITH THE DEFENDANT

A. The Sixth Amendment Does Not Prohibit Procedural Rules That Reasonably Promote Legitimate Interests In The Criminal Process

1. The central mission of the Sixth Amendment is to guarantee that the defendant in a criminal case has a fair opportunity to present his version of the facts so that the factfinder "may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). By protecting the defendant's right to confront the witnesses against him, to present the testimony of his own witnesses, and to enjoy the assistance of counsel, the Sixth Amendment spells out "the basic elements of a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

The defendant's opportunity to present his version of the facts, however, is necessarily qualified by other legitimate interests in the criminal trial process. The Court has recognized that a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988); *Washington* v. *Texas*, 388 U.S. at 23 n.21. Rather, evidence may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane* v. *Kentucky*, 476 U.S. 683,

690 (1986). Procedural rules governing the mode and presentation of proof, the regulation of objections, and the admissibility of evidence are indispensable to the orderly conduct of a criminal trial. Without an established set of rules, participants in a criminal trial would be unable to engage in rudimentary planning and meaningful presentation of their cases, courts would be unable to administer trials fairly and even-handedly, and "[t]he trial process would be a shambles." *Taylor*, 484 U.S. at 411.

The Confrontation Clause creates no exception to these principles.[6] Although the right to confront and to cross-examine witnesses plays a critical role in assuring the reliability of evidence adduced at a criminal trial, see *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990), that right "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). Because the Confrontation Clause must "be interpreted in the context of the necessities of trial and the adversary process," *Maryland* v. *Craig*, 110 S. Ct. at 3166, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

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[6] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U.S. 400 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

2. Procedural requirements that restrict the defendant's opportunity to present evidence are constitutionally suspect only when they are arbitrary or disproportionate to the legitimate interests they are designed to serve. See *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987); cf. *Henry* v. *Mississippi*, 379 U.S. 443, 448-449 (1965). The Court has articulated this principle in a variety of contexts.[7] In *Chambers* v. *Mississippi*, *supra*, the defendant in a murder trial was prevented from introducing evidence of another person's confession to the crime because of a state "voucher" rule, which precluded the defendant from cross-examining the witness after he recanted his confession, and a state hearsay rule, which precluded the testimony of individuals who had heard the witness's out-of-court confessions. Noting that the State neither sought "to defend the [voucher] rule," nor "explain[ed] its underlying rationale," 410 U.S. at 297, the Court concluded that the voucher and hearsay rules in tandem denied the defendant an adequate opportunity to present his defense. The Court explained that procedural rules may "not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

The Court employed a similar approach in construing the Compulsory Process Clause in *Washington* v. *Texas*, *supra*. There, a state rule prohibited persons charged as participants in the same crime from testifying, in certain circumstances, in behalf of other

[7] Although the rights provided by the Sixth Amendment offer distinct protections, the Court has attempted to formulate consistent standards in accommodating those rights within the context of the trial process, and in determining when limitations on those rights have become excessive and impermissible. See *Maryland* v. *Craig*, 110 S. Ct. at 3166; *Crane* v. *Kentucky*, 476 U.S. at 690.

participants. Condemning the rule as "arbitrarily" denying the defendant the opportunity to present relevant and material testimony, the Court concluded that the defendant's compulsory process rights were violated. 388 U.S. at 23.

More recently, in *Rock* v. *Arkansas*, *supra*, the Court distilled from its prior cases the formulation that "the right to present relevant testimony is not without limitation," but restrictions on that right "may not be arbitrary or disproportionate to the purposes they are designed to serve." 483 U.S. at 55-56. Applying that principle, the Court invalidated a blanket prohibition on testimony by a defendant as to facts he recalled after undergoing hypnosis, because the ban transgressed reasonable limits and constituted an "arbitrary restriction on the right to testify." *Id.* at 61.[8]

[8] The Court has expressed a similar view in finding, in particular cases, that the defendant's opportunity to mount a defense may be infringed by arbitrary trial rulings denying material cross-examination. See *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (trial court's restriction on cross-examination of an alleged rape victim about her relationship with another man based on "[s]peculation as to the effect of jurors' racial biases" was "beyond reason" when the relationship gave the victim a possible motive to fabricate a claim of rape); *Delaware* v. *Van Arsdall*, 475 U.S. at 679-681 (defendant's right violated when he was not permitted to establish that prosecution witness agreed to testify in exchange for having charges against him dropped; trial court had excluded the evidence as more prejudicial than probative). A confrontation violation may also occur where the State asserts a legitimate interest in preserving the confidentiality of certain information, but not a sufficient interest to outweigh the defendant's right to expose a witness's possible bias. *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974) (finding invalid a restriction on cross-examination that would have exposed a witness's juvenile record, which could be relevant to the defendant's claim of bias).

3. The principle that procedural rules designed to promote the integrity of the trial are valid, unless arbitrarily applied to thwart a fair presentation of the facts, applies with special force to rules that do not absolutely restrict a defendant's right to offer evidence, but merely condition the right on compliance with established procedures. This Court has held that rules requiring advance notice of anticipated trial evidence, such as alibi evidence, are not only constitutional, *Williams* v. *Florida*, 399 U.S. 78 (1970) (upholding reciprocal notice-of-alibi statute), but also "salutary development[s]" when applied in a fair and even-handed manner. *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973); see *Taylor* v. *Illinois*, 484 U.S. 400, 411 (1988) (rule "provid[ing] for pretrial discovery of an opponent's witnesses serve the same high purpose" as rules requiring advance notice of anticipated trial evidence). Such otherwise commendable rules become arbitrary and "fundamentally unfair" only when applied in a one-sided manner that undercuts the claimed government interest in ensuring trial fairness. See *Wardius*, 412 U.S. at 475 (invalidating non-reciprocal notice-of-alibi statute).

B. The Pretrial Notice Requirement of Michigan's Rape-Shield Statute Is A Reasonable Means Of Protecting Victim Privacy

Michigan's rape-shield statute does not require the exclusion of all testimony about an alleged rape victim's prior sexual conduct with the defendant. Indeed, the statute expressly authorizes trial judges to admit such evidence. What the statute does require is that the defendant follow specific procedures to obtain a ruling on the admissibility of the evidence. The defendant must file a written motion and offer of proof ten days after arraignment indicating his

intention to offer the sexual-conduct evidence. The trial judge then may order an in camera hearing to determine its admissibility. The evidence is admissible if and to the extent the judge determines that the evidence is material to a fact in issue, and that its probative value is not outweighed by its inflammatory or prejudicial effect. Mich. Comp. Laws Ann. § 750.520j(2) (West Supp. 1990).[9]

The Michigan Court of Appeals concluded that, as applied to sexual conduct between the defendant and the alleged victim, the notice-and-hearing requirement violates the Confrontation Clause. The court rested that holding solely on the reasoning articulated in *People* v. *Williams*, *supra*, which made two criticisms of the notice-and-hearing provision.[10] Declaring that the purpose of the notice provision is to bolster the prosecutor's ability to challenge sexual-conduct evidence at trial, *Williams* found that purpose irrelevant to prior sexual conduct between the defendant and the victim; unlike in the case of an alibi defense, the court thought that additional witnesses and investigation are not needed for the prosecutor to prepare his case. *Williams* further stated that an ad-

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[9] Although the statute puts substantive restrictions on the use of evidence of prior sexual conduct by barring the use of reputation evidence and by limiting the admissibility of specific instances of sexual conduct with persons other than the defendant, Mich. Comp. Laws Ann. § 750.520j(1) (West Supp. 1990), those restrictions were not applied to respondent. This case concerns the procedures mandated by the statute, not the statute's substantive policy judgments about categories of evidence that are inadmissible in sexual assault prosecutions.

[10] The *Williams* court acknowledged the validity of the notice requirement as applied to "sexual conduct between a complainant and third persons." 95 Mich. App. at 10, 289 N.W.2d at 866.

missibility determination regarding prior sexual conduct between the defendant and the victim "would necessarily break down into a consideration of the complainant's word against the defendant's word," thereby "usurp[ing]" the function of the trier of fact in determining the truth. 95 Mich. App. at 9-10, 289 N.W.2d at 866. In our view, the court of appeals' logic is untenable.[11]

The court's opinion that "no useful purpose" is served by the advance-notice requirement where the alleged conduct involves the defendant and complainant, Pet. App. 4a, is flawed on several levels. Even as to the purpose of the notice requirement identified by the court—to improve the prosecutor's ability to respond to the defendant's claims—the notice requirement would serve a valid function. Regardless of whether any eyewitness actually observed the parties engaged in the act of sex, persons who know the parties would certainly be able to offer circumstantial evidence (*e.g.*, admissions, observations of the parties' public conduct toward each other) tending to prove or disprove a prior sexual relationship and shedding light on the defendant's claims as to its duration and scope.

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[11] Respondent's contention (Br. in Opp. 9) that the decision below rests on an adequate and independent state ground is incorrect. *Williams* is the central Michigan precedent underpinning the judgment of the court of appeals, Pet. App. 3a-6a, and it rests squarely on federal law. See 95 Mich. App. at 5, 289 N.W.2d at 864. There is no "plain statement" in the decision below (or in *Williams*) that the principles requiring the reversal of respondent's conviction derive from state law. See *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Illinois* v. *Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

More fundamentally, the essential purpose of the notice-and-hearing procedure is to protect rape victims against unnecessary harassment and invasion of privacy. The Michigan statute, enacted in 1974, was the first rape-shield statute in the Nation; currently, rape-shield statutes have been enacted by nearly every State and by Congress. These statutes reflect a widely shared legislative judgment that the traditionally open-ended cross-examination of rape victims about their prior sexual history needlessly degrades victims, introduces irrelevant and prejudicial evidence, invites the jury to make moral judgments about the victims' character, and ultimately makes the trial experience so humiliating for victims as to discourage the reporting of rape.[12]

An integral part of the legislative protection of rape victims is the requirement of advance notice fol-

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[12] The background of Michigan's statute is traced in *People* v. *LaLone*, 432 Mich. 103, 123-125, 437 N.W.2d 611, 619-620 (1989). For discussions of the genesis of rape-shield statutes, their purposes, and their constitutional implications, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977); Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986); Nat'l Inst. of Law Enforcement and Crim. Justice, *Forcible Rape: An Analysis of Legal Issues* (1978); 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5381-5393 (1980 & Supp. 1990). The purposes of Fed. R. Evid. 412 are explicated in the debate accompanying the enactment of the rule. See 124 Cong. Rec. 36,256 (1978) (remarks of Sen. Biden); *id.* at 34,913 (remarks of Reps. Mann and Holtzman). Although Michigan's procedural requirements are not universally found in rape-shield statutes, "[m]ost rape victim shield laws require notice and a pretrial hearing before the defense may elicit sexual history testimony at trial." Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544, 577 (1980).

lowed by an in camera hearing on the admissibility of sexual-history evidence. Under both Michigan and federal law, advance notice is a necessary prerequisite to the in camera hearing at which admissibility is determined. Fed. R. Evid. 412(c)(2); Mich. Comp. Laws Ann. § 750.520j(2) (West Supp. 1990).

> The notice requirement prevents surprise to the prosecutor, the victim, and the court. The prosecutor can weigh the evidence and determine whether or not he will object to its admission, confer with the victim on its truthfulness, and organize legal argument to oppose it if that is the chosen strategy. The notice requirement also signals the court of the importance of the issue since some judges have tended to assume the relevancy of prior sexual conduct. * * *
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> The main purpose of the private hearing is to protect the victim from the embarrassment which might occur if the details of her sexual history were revealed and debated in public. Quite possibly the evidence will be ruled inadmissible and the public may never know about these facts. * * * If the evidence is ruled to be admissible, then, of course, it would be presented in the public trial.

Nat'l Inst. of Law Enforcement and Crim. Justice, *Forcible Rape: An Analysis of Legal Issues* 26-27 (1978). See 124 Cong. Rec. 36,256 (1978) (remarks of Sen. Biden) (noting that Fed. R. Evid. 412 "establish[es] a special in camera procedure whereby the question of admissibility could be litigated without harm to the privacy rights of the victim or the constitutional rights of the defendant"); *id.* at 34,913 (remarks of Rep. Mann) (in camera hearing "protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible"); *People* v. *Hackett*, 421 Mich. 338, 350,

365 N.W.2d 120, 125 (1984) ("A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial."). Only if notice is given before trial can the special in camera hearing occur without delaying and interrupting the trial itself.[13]

While evidence of prior sexual conduct between the victim and the defendant may be relevant in many cases for the purpose of showing consent or bias,[14] the

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[13] Although the Michigan Court of Appeals did not describe the protection of victim privacy as one of the purposes of the notice-and-hearing procedure, the Michigan Supreme Court has made it clear that protection of privacy is one of that provision's purposes. *People* v. *Hackett, supra*; cf. *People* v. *Williams*, 416 Mich. at 47-48, 330 N.W.2d at 832 (Kavanagh, J., concurring) ("The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an *in camera* determination that such evidence is more probative than prejudicial."). Moreover, by making notice a necessary prelude to an in camera hearing, the statute on its face discloses a purpose to do more than just facilitate trial preparation. See also, Note, *Michigan's Criminal Sexual Assault Law*, 8 U. Mich. J.L. Ref. 217 (1974) (describing overall revision of Michigan's rape laws in 1974, including enactment of the shield provision, as part of a program to protect victim privacy).

Because the essential purpose of the notice-and-hearing procedure is to protect victim privacy, and not to facilitate pretrial discovery, the absence of "reciprocity" does not undermine the validity of the provision. See Berger, *supra*, at 80 (noting the difficulty of articulating a sense in which the provision could be reciprocal); 23 C. Wright & K. Graham, *supra*, § 5390, at 617 (same).

[14] See, *e.g.*, *People* v. *Perkins*, 424 Mich. 302, 379 N.W.2d 390 (1986) (sexual conduct between defendant and complainant one week before crime found admissible).

notice-and-hearing requirement serves important objectives even where the evidence is offered for those purposes. As an initial matter, evidence of a prior consensual sexual relationship between defendant and complainant is not invariably relevant even on the issues of consent and bias. *State* v. *Stellwagen*, 232 Kan. 744, 746-747, 659 P.2d 167, 169-170 (1983) (evidence lacked probative value because of remoteness in time). Michigan courts, like other courts, have recognized that because of lack of relevance, a defendant may not be entitled to introduce evidence of his own prior sexual relationship with the victim. See *People* v. *Williams*, 416 Mich. 25, 35-40, 330 N.W.2d 823, 826-829 (1982) (prior consensual sexual act between the defendant and the victim lacked probative value on whether the victim later consented to have group sex with the defendant and three others); *People* v. *Smith*, 128 Mich. App. 361, 363-364, 340 N.W.2d 855, 856-857 (1983) (prior sexual conduct between defendant and the victim was not material because the defendant did not raise a consent defense, but sought only to impeach the complainant's credibility); *State* v. *Hagen*, 391 N.W.2d 888, 892 (Minn. Ct. App. 1986) (defendant failed to raise an issue of consent or bias to which prior sexual acts with the victim were relevant).

Even when evidence of a prior sexual relationship between the defendant and complainant is admissible, the notice-and-hearing procedure allows the trial court to fashion appropriate limits on the scope of the inquiry allowed. For example, a trial court may decide to allow general inquiry into the fact of the prior sexual relationship between the defendant and the victim while nevertheless precluding evidence re-

garding certain specific sexual acts. See *People* v. *Zysk*, 149 Mich. App. 452, 458-460, 386 N.W.2d 213, 216-217 (1986) (limiting evidence of prior sexual relationship between the complainant and defendant to type of sexual conduct involved in the alleged assault). Rule 412(c)(3) of the Federal Rules of Evidence expressly provides for an order following the in camera hearing "specif[ying] evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined." The desirability of fine-tuning the permissible lines of inquiry to avoid unnecessary and prejudicial exposure of the victim's sexual past is not an arbitrary limitation on the defendant's rights, nor is it disproportionate to the State's interest in protecting the victim's privacy to the extent possible. Cf. *The Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2611 (1989) (noting that the "privacy of victims of sexual offenses" is a "highly significant" interest); *Morris* v. *Slappy*, 461 U.S. 1, 13 (1983) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims.").

A pretrial hearing would not simply consist of a credibility contest between the defendant and the complainant, as the Michigan Court of Appeals suggested in *People* v. *Williams*. A court sitting in camera may interpret the evidence in the light most favorable to the defendant and still conclude that the sexual-history evidence is not relevant, or that its relevance is so marginal as to justify its exclusion because of its potential to distract the jury. Nothing in Michigan law requires that, in assessing the probative force of the evidence, the court must determine

as a factual matter whether prior consensual sexual acts actually occurred.

In sum, the advance notice requirement in Michigan's rape-shield statute is supported by nonarbitrary purposes, and its procedures are properly designed to serve those goals. It therefore provides a legitimate basis for the imposition of evidentiary sanctions in appropriate cases when the defendant fails to comply with the statute's requirements.

C. The Sanction Of Precluding A Line Of Cross-Examination May Legitimately Be Imposed In A Particular Case When A Defendant Has Failed To Comply With A Reasonable Notice Requirement

The trial court enforced Michigan's notice requirement by precluding inquiry into respondent's prior sexual relationship with the complainant. When a defendant fails to comply with a reasonable notice requirement and thereby deprives the trial court of an opportunity to conduct an in camera hearing in advance of the trial, preclusion of cross-examination of the complainant on her prior sexual conduct with the defendant may be warranted. But because the denial of such cross-examination may, in a particular case, seriously impede the defendant in presenting his defense, the Sixth Amendment requires careful inquiry before a trial court imposes that sanction.[15]

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[15] No confrontation issue is presented unless a reasonable factfinder "might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination," *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (brackets in original), quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986). Although that issue is governed by federal law, the findings of the Michigan Court of Appeals as to the character and relevance of the excluded evidence in this case, Pet. App. 5a-7a, 11a-12a, support the view that the *Olden-Van Arsdall* standard was met.

1. The sanction of preclusion is a necessary and appropriate response in certain cases to a defendant's failure to comply with rules of procedure. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), this Court rejected the proposition that the Compulsory Process Clause absolutely forbids the preclusion of defense-witness testimony as a sanction for the defendant's breach of a discovery rule. Although noting that "the fundamental character" of the defendant's right to present evidence must be respected, the Court stated that "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* at 414-415. On the facts in *Taylor*, the Court upheld the trial court's preclusion order. *Id.* at 416-417. See also *United States* v. *Nobles*, 422 U.S. 225 (1975) (upholding preclusion of defense investigator's testimony when defendant refused to disclose investigator's underlying report).

Taylor did not "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." 484 U.S. at 414. Although recognizing that "alternative sanctions are adequate and appropriate in most cases," *id.* at 413, the Court indicated that a trial judge may call upon the defendant to explain his omission, and, if the omission is revealed to be willful and part of an effort to achieve tactical advantage through surprise, preclusion is entirely appropriate. *Id.* at 414. Another relevant consideration

is the ease of compliance with a particular procedural rule. *Id.* at 415. Finally, the Court rejected the view that preclusion is inappropriate simply because the prosecution could be protected from prejudice through alternative procedures (such as a continuance or voir dire), *id.* at 416-417, or because the failure to comply might be attributable to the lawyer's misconduct rather than the client's. *Id.* at 417-418.

Although *Taylor* addressed the compatibility of a preclusion sanction with the Compulsory Process Clause, the same analysis should apply under the Confrontation Clause, which is similarly designed to protect the defendant's ability to elicit facts at trial that he believes helpful. Cf. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 593 (1978). *Taylor* observed that the compulsory process right differs from other Sixth Amendment rights in that "its availability is dependent entirely on the defendant's initiative," and requires "deliberate planning and affirmative conduct" to be effective. 484 U.S. at 410. But that distinction is inapplicable in a setting such as this, where the focus of the rule is on the introduction of evidence and it is immaterial whether the evidence is introduced on cross-examination of a government witness or on direct examination of a defense witness.[16]

[16] Respondent was precluded both from cross-examining Brown about his sexual relationship with her, and from offering his own testimony on that issue. Only the restriction on cross-examination is at issue here. Respondent did not claim an infringement of his constitutional right to testify in the lower courts, and that issue was not discussed by the Michigan Court of Appeals. See Resp. C.A. Br. 15-19; Pet. App. 1a-7a; see also Br. in Opp. 6-7. In reversing respondent's conviction the court relied (Pet. App. 3a-4a, 6a) almost entirely on *People* v. *Williams*, where the court had concluded that the notice provision in Michigan's rape-shield statute violated the "defendant's sixth amendment rights to confrontation and cross-examination." 95 Mich. App. at 5, 289 N.W.2d at 864. The only question presented by the petition is whether the Confrontation Clause was violated by the trial court's ruling in this case. Pet. i.

2. In this case, respondent's counsel waited until the eleventh hour—the first day of trial—before moving to introduce evidence of the complainant's prior sexual conduct with respondent. As counsel conceded, the request was substantially out of time under Michigan's rape-shield statute, and respondent offered no satisfactory explanation for the delay.[17] The trial judge was therefore justified in imposing some sanction, and it is unclear what effective sanction he could have devised short of preclusion. To grant a continuance and adjourn the trial to entertain respondent's motion not only would have caused administrative disruption, and inconvenience to all trial participants, but also would have rewarded respondent's procrasti-

[17] Respondent was arrested on September 5, 1984, Tr. 140, and was initially represented by retained counsel. After a preliminary examination on September 18, 1984, the arraignment on the information was held on October 25, 1984. A motion under Michigan's rape shield statute was due ten days later. Respondent's retained counsel did not file such a motion before withdrawing on November 8, 1984. The trial judge appointed new counsel for respondent on February 8, 1985. Although new counsel obviously could not have filed a motion to admit the sexual-conduct evidence within the ten-day period after arraignment, she offered no excuse for failing to move to admit the evidence until the beginning of trial on May 14, 1985.

nation with a trial delay that perhaps was sought for tactical effect. A defendant has no right to an automatic continuance in this setting. Cf. *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) ("[B]road discretion must be granted trial judges on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."); *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.").

Moreover, the rape-shield statute creates a relatively simple procedure for counsel to follow. The requirement of notice and an offer of proof is a familiar one to trial lawyers, and it is triggered at a sufficiently advanced stage of the criminal process in Michigan to make it reasonable to require the defendant to state his intention to introduce sexual-history evidence. The defendant will already have had a preliminary hearing to determine probable cause, at which he may call and cross-examine witnesses, and will have entered his plea to the charges.[18] In a sexual-assault case, the

[18] Under Michigan procedure, a defendant is initially arraigned on the warrant of arrest, or on complaint, and advised of his constitutional rights. Mich. Ct. R. 6.104. Within the following 12 days a preliminary examination is scheduled. *Id.* at 6.104(E). The preliminary examination determines whether probable cause exists to bind the defendant over for trial, Mich. Ct. R. 6.110, and "[e]ach party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses." *Id.* at 6.110(C). Following the preliminary examination, the prosecution is initiated by the filing of an information or an indictment. Mich. Ct. R. 6.112. At that juncture, the arraignment on the information occurs, and the defendant enters his plea. Mich. Ct. R. 6.113.

defendant should know by that time whether his past sexual relations with the complainant will be a factor in his defense.

To be sure, there are considerations weighing against the sanction of preclusion in this case. The trial court did not explicitly address the question whether any lesser sanctions would be adequate, or whether it would have materially delayed the trial to conduct a hearing on respondent's motion. Sanctions should be graduated to the seriousness of the infraction, and the process of doing so involves the exercise of discretion. A universal application of the preclusion sanction when a notice is untimely would produce harsh results and, in extreme cases, could result in a Confrontation Clause violation.[19] In determining whether the Sixth Amendment is violated by a preclusion order in a particular case, a court must consider the degree, purpose, and effect of the violation. For example, preclusion would be constitutionally valid if the court determined that the violation was the product of willful misconduct, or purposely planned to obtain a tactical advantage. See *Taylor*, 484 U.S. at 416-417. Also relevant to the constitutional in-

[19] For example, if a notice were filed a few days late due to justifiable reasons beyond counsel's control in an isolated instance, that should normally not trigger preclusion. Likewise, if an indigent defendant had not received appointed counsel during the period when notice was due, enforcement of the statutory time limits by preclusion would normally be inappropriate in the absence of some apparent tactical purpose by the defense or serious prejudice to the prosecution.

quiry is the effect of the violation in disrupting the trial proceedings or prejudicing the opposing party. Courts should also consider whether admission of the evidence would compromise the policies of the particular procedural rule that was violated. And it is, of course, highly relevant to determine the effect that preclusion of the evidence would have on the defendant's ability to present the essence of his defense.

Unlike the record in *Taylor*, the record in this case does not at this point suggest that the violation of the notice requirement was the product of a tactical effort to gain an unfair advantage at trial, although that issue was not developed below. It is also unclear whether the prosecution was prejudiced by the late notification of respondent's intention to offer evidence of prior sexual conduct,[20] or whether the preclusion order denied the defendant an opportunity to present the substance of his defense. It does appear, however, that the purpose of the rape-shield statute to afford privacy to the victim can still be preserved by conducting a late, but in camera, hearing on the admissibility of the evidence.

In our view, the initial weighing of these factors, and the further development of the record if necessary, should be undertaken by the Michigan courts in the first instance. The reasons for respondent's delay are unclear, and the trial court did not make specific findings on any of the questions bearing on the constitutionality of the preclusion sanction in this case.

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[20] The prosecution was aware of prior sexual conduct between the parties, as the complaining witness had been cross-examined at the preliminary examination about her sexual relationship with respondent. Pr. Tr. 23.

Nor did the court of appeals consider the sanctions issue, apart from its view on the unconstitutionality of the notice requirement. If this Court were to uphold the constitutionality of the statutory notice requirement, it is not clear that the Michigan courts would uphold the sanction imposed in this case as a matter of state law.[21] If state law authorizes the sanction, the Michigan courts are better situated than is this Court to review and develop the factual issues that bear upon whether the trial court's exercise of discretion was compatible with the Confrontation Clause.

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[21] The rape-shield statute does not specifically mandate preclusion as a consequence of the failure to comply with the notice requirement. Although the Michigan Court of Appeals has upheld a trial court's exclusion of sexual-history evidence for failure to comply with the notice requirement alone, *People* v. *Smith*, 128 Mich. App. 361, 363, 340 N.W.2d 855, 856 (1983) (alternative holding), other Michigan decisions suggest that trial courts should exercise discretion as a matter of state law before applying notice provisions to exclude evidence, particularly when federal constitutional rights are at stake. See *People* v. *Merritt*, 396 Mich. 67, 82, 238 N.W.2d 31, 37-38 (1976) (discussing notice-of-alibi statute; "[t]he preclusion sanction is an extremely severe one, and the judge's discretion in exercising preclusion should be limited only to an egregious case."); *People* v. *Bennett*, 116 Mich. App. 700, 323 N.W.2d 520 (1982).

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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No. 90-149

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

NOLAN K. LUCAS,

Respondent.

On Writ Of Certiorari
To The Michigan Court Of Appeals

BRIEF AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Criminal Defense Attorneys for Michigan (CDAM) is a statewide, nonprofit organization with several hundred members including all public defenders in the State of Michigan as well as contract defenders and private attorneys. Since its inception in 1976, CDAM has been active in providing continuing legal education for criminal defense lawyers, and in serving as *amicus curiae* in cases of significance to the criminal jurisprudence of the State of Michigan.

Amicus Curiae files this brief to urge this Court to decline to rule on the Constitutionality of the Michigan Rape Shield Statute as that question was not necessary to the ruling of the Michigan Court. Rather, the Michigan Court of Appeals ruled the state trial court's exercise of the discretion authorized by the statute was wrong and denied Mr. Lucas his constitutional right of confrontation.

STATEMENT OF THE CASE

Amicus accepts the statement of the case presented by Mr. Lucas.

Amicus adds at the preliminary examination that defense counsel cross examined the complainant about her prior sexual relations with Mr. Lucas (Pr. Tr. 23). In addition, Mr. Lucas also testified on the same point at the preliminary examination (Pr. Tr. 62).

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[1] Letters of consent to the filing of this brief have been lodged with the clerk pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The State of Michigan Rape Shield Law with its notice provision has not been held unconstitutional in Mr. Lucas' case. Rather, the Michigan Court of Appeals held that the imposition of the maximum sanction of preclusion of cross examination in this fact situation denied Mr. Lucas his constitutional right of confrontation.

The Michigan Court of Appeals may have been careless in its analysis, but it is implicit in its two rulings that it did consider the "issue whether the trial court properly exercised its discretion in limiting respondent's proposed cross examination in this case." (Brief of *Amicus Curiae* United States, P. 9).

Therefore, this Court should affirm the ruling of Michigan Court of Appeals.

ARGUMENT

The decisions of the Michigan Court of Appeals did not need to rule on the constitutionality of the Rape Shield Law nor its notice provision. Rather, the rulings were a review of the trial judge's failure to exercise discretion in disallowing cross examination of the complainant. The Michigan Court found if the trial court had exercised its discretion, it would have had to allow cross examination. Thus, the case is similar to this Court's decision in *Davis v Alaska*, 415 US 308 (1974).

In Davis, a state trial court prohibited cross examination of a prosecution witness based on an Alaska statute that said a juvenile court disposition was not admissible

in a subsequent trial. The State of Alaska's legislature had determined that as a matter of public policy juvenile proceedings were confidential. This policy was to protect the juvenile from embarrassment in subsequent adult court proceedings.

In *Davis*, the accused attempted to cross examine the state's witness with his prior juvenile record to show that he was biased, because he was on probation. The trial court ruled the statute prevented the use of the record for cross examination. This Court held the application of the state statute to the facts resulted in Davis being denied his constitutional right to confrontation.

> "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*" Id at 315-6. (Emphasis in original).[2]

It is important to note that it was not necessary to the *Davis* decision to rule on the constitutionality of the Alaska statute. Likewise, in this case, the constitutionality of the Michigan Rape Shield Law and its notice provision is not in question. Rather, the Michigan decision was based upon the application of the preclusion sanction to the facts of this case.

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[2] Justice White joined by Chief Justice Rehnquist dissented on the basis that there was no constitutional principle at stake, but rather a state court exercising its discretion in limiting cross-examination. Id at 321. They would give great respect to the state court's decision. That analysis would also result in this Court ruling to affirm the Michigan Court of Appeals decision.

Certainly, if the concern of the legislature were to protect the complainant, that concern was overcome when the complainant was cross examined about her prior sexual relationship with Mr. Lucas at the preliminary examination (Pr. Tr. 23).

In addition, the statute cannot claim surprise, because the cross examination at the preliminary examination provided actual notice prior to the running of the ten days that the defense was based in part on the prior sexual relationship between the complainant and Mr. Lucas. Further, the trial court could have granted an adjournment if the prosecutor needed more time to prepare.

Thus, it is clear what the Michigan Court of Appeals decided was that the trial court's limitation on cross examination in this fact situation was a constitutional error, which was not harmless.

It should be noted Amicus does not address the question of whether a state may enact a statute requiring notice of intent to cross examine an alleged rape victim, nor whether the notice provision in the Michigan statute is constitutional, nor whether preclusion of cross examination on that point may be used as a sanction for failure to comply with the notice provision. Rather, Amicus submits in this case the Michigan Court has concluded that where the prosecution had actual notice of the cross examination and the trial court invoked preclusion without exercising its discretion, Mr. Lucas was denied his constitutional right of cross examination.

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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